LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 58

ALBERT ROVIARO, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 6, 1956
CERTIORARI GRANTED MAY 21, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 58

ALBERT ROVIARO, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Northern District of Illinois	1	1
Statement under Rule 10(b)	a	1
Indictment	c	2
Waiver of reading of indictment, plea of not guilty, and order setting case for trial	e	3
Motion for bill of particulars	f	3
Order denying motion for bill of particulars and continuing cause	h	4
Transcript of proceedings	1	5
Appearances	1	5
Waiver of jury trial	2	5
Testimony of Norris M. Durham—		
Direct	3	6
Cross	54	36
Redirect	81	52
Colloquy between Court and counsel	84	54

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1956

—405-1

	Original	Print
Record from the United States District Court for the Northern District of Illinois—Continued		
Transcript of proceedings—Continued		
Testimony of Norris M. Durham—		
Cross (resumed)	88	56
Redirect	118	74
Recross	131	81
James L. Bryson—		
Direct	133	83
Cross	153	94
Redirect	165	102
Recross	167	103
George T. Sims—		
Direct	170	105
Cross	183	112
James T. Fields—		
Direct	189	116
Cross	201	123
Redirect	210	129
Motion for judgment of acquittal and denial thereof	213	130
Reporter's certificate (omitted in printing)	215	
Government's Exhibit No. 6—Envelope—Bureau of Narcotics	216	131
Judgment and commitment	217	132
Motion for new trial	218	133
Order denying motion for new trial	220	134
Notice of appeal	221	135
Bond on appeal	224	136
Statement required under Rule 10(c) of the Rules of the Court of Appeals for the 7th Circuit	225	138
Designation of record	226	138
Order re exhibits and record	229	140
Clerk's certificates (omitted in printing)	230	
Proceedings in the United States Court of Appeals for the Seventh Circuit	231	141
Opinion, Lindley, J.	231	141
Judgment	236	145
Order denying petition for rehearing	237	146
Clerk's certificate (omitted in printing)	238	
Order allowing certiorari	239	146

[fol. a]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 54 CR 511

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALBERT ROVIARO, Defendant

STATEMENT UNDER RULE 10(b)

This suit was begun by Indictment filed September 3, 1954.

The prosecution was by the United States of America, Plaintiff, against Albert Roviaro, Defendant.

The defendant entered a plea of not guilty and was on bail pending trial in the sum of $7500.00.

The trial was begun and completed on June 13, 1955 before Judge Win G. Knoch, without a Jury.

No matter was referred.

A finding of guilty was entered and judgment given thereon on October 17, 1955. The defendant was sentenced to two years on each of the two counts of the indictment to run concurrently, and fined $5.00 on each count.

Motion for New Trial was denied October 19, 1955.

[fol. b] Notice of Appeal was filed October 19, 1955.

Bail was fixed by the trial Judge at $10,000.00 pending appeal. Such bail was filed and the defendant is at large on such bail pending appeal.

Maurice J. Walsh, Attorney for Defendant.

[fol. c] UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 54 CR 511

(Section 2554(a), Title 26, U.S.C. Section 174, Title 21, U.S.C.)

UNITED STATES OF AMERICA

vs.

ALBERT ROVIARO

INDICTMENT—Filed September 3, 1954

The August 1954 Grand Jury charges:

That on, to wit, August 12, 1954, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division,

ALBERT ROVIARO, defendant herein, did unlawfully and wilfully sell to John Doe for a consideration the exact amount of which is unknown to the Grand Jurors, a quantity of a certain narcotic drug, to wit, Three (3) ounces of heroin, not in pursuances of a written order from the said John Doe on a form issued in blank for that purpose by the Secretary of the Treasury of the United States; in violation of Section 2554(a), Title 26, United States Code.

[fol. d] Count Two

The August 1954 Grand Jury further charges:

That on, to wit, August 12, 1954, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division,

ALBERT ROVIARO, defendant herein, did then and there fraudently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of a quantity of a certain narcotic drug, to wit, Three (3) ounces of heroin, knowing the same to be imported into the United States contrary to law; in violation of Section 174, Title 21, United States Code.

A True Bill:

Benton B. Wood, Foreman; R. Ticken, United States Attorney.

[fol. e] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

WAIVER OF READING OF INDICTMENT, PLEA OF NOT GUILTY AND ORDER SETTING CASE FOR TRIAL—October 21, 1954

This day comes the United States by the United States Attorney comes also the defendant Albert Roviaro in his own proper person and by his counsel and being arraigned upon the Indictment filed herein against him waives reading thereof and pleads not guilty thereto and it is

Ordered that this cause be and the same is hereby set for trial on December 7, 1954.

[fol. f] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION FOR BILL OF PARTICULARS—Filed December 17, 1954

Now comes the defendant, ALBERT ROVIARO, by his attorney, Maurice J. Walsh, and makes this his motion for a Bill of Particulars, and in support of said motion states:

That the said indictment contains two counts, apparently relating to the same alleged transaction. Count I charges the sale by the defendant of an amount of narcotic drug to one "John Doe".

All counts state that said offenses occurred on "to-wit, August 12, 1954", and, "at Chicago, Illinois".

It is respectfully represented that without further identification of the alleged offenses the defendant is unable to know the offense with which he is charged and adequately to prepare his defense, and will be subject to surprise upon the trial.

It is respectfully submitted that the United States is in possession of knowledge and fact which will enable it to disclose the date upon which it intends that the proof will

show and the place in the City of Chicago at which it occurred.

It is further represented that the United States is in possession of and has knowledge of the correct name and identity of the alleged purchaser.

[fol. g] It is further respectfully represented that the disclosure of such information cannot harm or damage the prosecution of this indictment.

Wherefore, the defendant requests that he be furnished particulars as follows:

1. What is the name, address and occupation of the alleged purchaser described as John Doe in Count I of the indictment?

2. On what date and at what time on said date did the alleged offense occur?

3. At what place, by street and number, did the offense or offenses charged in the indictment occur?

It is respectfully requested that this Court enter its order requiring the United States Attorney to file a Bill of Particulars as above requested, within such time as the Court shall deem proper.

Maurice J. Walsh, Attorney for Defendant, Albert Roviaro.

[fol. h] In the United States District Court for the Northern District of Illinois, Eastern Division

[Title omitted]

Order Denying Motion for Bill of Particulars and Continuing Cause—January 7, 1955

The Court being fully advised in the premises it is

Ordered that the defendant's motion for a Bill of Particulars be and the same is hereby denied and that this cause be and the same is hereby continued to January 12, 1955 to fix date for trial.

[fol. 1] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 54-CR-511

UNITED STATES OF AMERICA, Plaintiff,

vs.

ALBERT ROVIARO, Defendant

Transcript of Proceedings

had and testimony taken at the trial of the above-entitled cause before the Honorable Win G. Knoch, one of the Judges of said Court, in his Court Room, in the United States Court House, Chicago, Illinois, on Monday, June 13th, 1955, commencing at 10:30 o'clock a.m.

APPEARANCES:

Hon. Robert Tieken, United States Attorney for the Northern District of Illinois, Eastern Division, by

Mr. Chester Edward Emanuelson, Assistant United States Attorney, appeared for the United States of America;

Mr. Maurice J. Walsh, (Suite 2212, 105 West Adams Street, Chicago, Illinois), appeared for the Defendant.

[fol. 2] The Clerk: 54-CR-511, the United States of America, vs. Albert Roviaro, for trial.

Mr. Walsh: I guess we are both ready, your Honor.

Mr. Emanuelson: We are ready.

WAIVER OF JURY TRIAL

Mr. Walsh: The Defendant desires to execute a waiver of Jury.

The Court: Very well. That may be done.

(A waiver of Jury was thereupon duly executed.)

Mr. Walsh: May I go to Judge Barnes' Court for a few minutes?

The Court: Yes. We will start this case at ten-thirty. How long will it take?

Mr. Emanuelson: About a day. Probably less than a day, your Honor.

The Court: All right.

(Whereupon the Court gave attention to other matters on the call, after which the following further proceedings were had herein, in open Court, to-wit:)

The Clerk: 54-CR-511, United States vs. Roviaro, the case on trial.

The Court: You may proceed.

Mr. Emanuelson: I imagine defense counsel is going to make a motion to exclude witnesses.

[fol. 3] Mr. Walsh: Yes. I would like to.

The Court: All those who have been called here to testify either by subpoena or voluntarily are asked to leave the Court Room until they take the witness stand.

Mr. Emanuelson: Does your Honor want an opening statement?

The Court: Just briefly.

(Counsel for the Government and counsel for the Defendant thereupon made opening statements to the Court.)

The Court: You may call your first witness.

(And thereupon the United States of America, to maintain the issues in its behalf, introduced the following evidence, to-wit:)

Mr. Emanuelson: Mr. Durham.

(The witness was thereupon duly sworn.)

Norris M. Durham, called as a witness on behalf of the United States of America, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Emanuelson:

[fol. 4] Q. Will you state your name, please, sir?

A. Norris M. Durham.

Q. You reside in Chicago, Illinois?

A. That is correct, sir.

Q. You are employed by the United States Government?

A. That is right.

Q. In what department and in what capacity?

A. United States Treasury Enforcement Agent, attached to the Bureau of Narcotics, Chicago, Illinois.

Q. You are assigned to Chicago now, are you?

A. That is right, sir.

Q. How long have you been employed in that capacity in this city?

A. In this city, approximately three years and two months.

Q. For the United States Government?

A. Approximately three and a half years.

Q. Do you know the Defendant, Albert Roviaro?

A. Yes, I do.

Q. Do you see him in the Court Room?

A. Yes, I do.

Q. Can you point him out, please?

A. He's the gentleman in the gray suit, seated at counsel table.

[fol. 5] Mr. Emanuelson: Your Honor, may the record show the witness has identified the Defendant, Albert Roviaro.

The Court: It may so indicate.

By Mr. Emanuelson:

Q. When was the first time you had occasion to see Albert Roviaro?

A. On June 22nd, 1954, in Chicago, Illinois.

Q. When was the next occasion?

A. On June 28th, 1954, in the city of Chicago, Illinois.

Q. Where did you see him on these two occasions you have mentioned?

A. On June 22nd, 1954, I saw Albert Roviaro at 72nd and Michigan Avenue in the city of Chicago, and on June 28th, 1954, I saw Albert Roviaro at 51st and Prairie Avenue in the city of Chicago, at which time he went into the premises——

Mr. Walsh: I object to this, your Honor. The only date mentioned in the indictment is August 12th, 1954. I assume we will not be concerned with some other date.

Mr. Emanuelson: It is just for the purpose of identification. If your Honor wishes, we will withdraw the two questions and the two answers.

The Court: Proceed.

[fol. 6] By Mr. Emanuelson:

Q. Were you employed in the capacity which you previously stated on August 12th, 1954, at 5:00 o'clock p. m.?

A. I was, sir.

Q. What if anything occurred at that time?

A. On that date I proceeded to the intersection of 75th and Prairie Avenue in Chicago. There I met Detectives James Bryson and George Sims, and John Doe.

Q. What happened then, if anything?

A. John Doe was driving at 1954 Cadillac, Model 62 sedan. After we arrived at that intersection we parked, all of us, our various cars on the west side of Prairie Avenue just north of 75th Street.

Q. Had you had a previous meeting with John Doe?

A. Yes, I had.

Mr. Walsh: I thought you said "John Grode."

Mr. Emanuelson: No.

Mr. Walsh: John Doe?

By Mr. Emanuelson:

Q. Will you repeat your last answer? My question to you was, what happened on August 12th, 1954, at 5:00 p. m. o'clock with references to that date? Who did you meet at that time?

[fol. 7] A. We each met at 75th and Prairie Avenue in Chicago and parked our automobiles on the west side of Prairie Avenue just north of 75th Street.

Mr. Walsh: Let me understand. As I understood the witness, he met Police Officers Bryson, Sims and John Grode.

The Witness: John Doe.

Mr. Walsh: What?

The Witness: John Doe.

Mr. Walsh: Is he a Police Officer?

The Witness: No, sir.

Mr. Emanuelson: No; he is not a Police Officer.

Mr. Walsh: All right.

My Mr. Emanuelson:

Q. Now, I had last asked you about whether you had a previous meeting with John Doe. Will you tell us what took place at that time? I think you indicated for the record you had.

A. I met John Doe——

Mr. Walsh: Is this a conversation you are asking for now?

Mr. Emanuelson: No, not a conversation.

The Witness: I met John Doe——

Mr. Walsh: Well, was this on the same date?

[fol. 8] Mr. Emanuelson: No. It is prior to the 12th. When he gets to the conversation I am sure you will not object, but if you want to you can object at that time.

Mr. Walsh: Well, if counsel is attempting to produce evidence of some other activity——

Mr. Emanuelson: I am not doing that. I am not introducing something else for the purpose of prejudice.

Mr. Walsh: I object.

Mr. Emanuelson: The indictment, your Honor, refers to a John Doe.

The Court: You may proceed.

Mr. Emanuelson: He is the informer, if you want to characterize him. Would you prefer that he be characterized as the informer instead of John Doe?

Mr. Walsh: I don't know what he is. I don't know him.

Mr. Emanuelson: I think you will find out as the testimony goes along. I just want to make it clear. I want to be sure defense counsel knows who John Doe is and who the witness means when he refers to "John Doe", so he will know whether he is talking about a Police Officer or not. He previously said he thought it was a Police Officer.

Mr. Walsh: Judge, I do not want to interrupt too extensively, but we did ask for a Bill of Particulars in

[fol. 9] this case, asking for the name of John Doe and for various other particulars at the specific time this thing occurred, and the Government opposed our motion, so as far as the record is concerned so far we do not know anything about John Doe.

For all I know, that may be his right name. I assume it is a legalistic fiction, or one they had adopted.

Mr. Emaunelson: Just so the record will be clear, the Defendant made a motion for a Bill of Particulars and your Honor denied it.

We both filed briefs, and in the briefs it was set out that this man was an informer and we cited cases showing why the Government did not have to reveal the name of the informer. We cited cases in Wigmore on Evidence——

The Court: You may proceed with the examination.

Mr. Emanuelson: Mr. Reporter, will you read the last question, please?

Q. (Read by the Reporter.)

Mr. Walsh: Well, now, may we have the time and place first?

Mr. Emanuelson: Yes.

By Mr. Emanuelson:

Q. Will you give us the time and place?

[fol. 10] A. Yes, sir. On August 10th, 1954, I met John Doe on the highway at 75th and Indiana Avenue, and as a result of that meeting——

Mr. Walsh: I object to the conclusion and move to strike out "as a result of that meeting."

Mr. Emanuelson: Do not give us conclusions.

By Mr. Emanuelson:

Q. Just tell us what happened. Of course, you cannot give any conversation.

A. I made arrangements with John Doe to meet——

Mr. Walsh: I object to this. This is obviously a left-handed way of putting in conversation. You cannot make arrangements, I submit, without communication.

Mr. Emanuelson: I anticipated this, your Honor, and I would like to cite the case of United States vs. Williams,

161 Fed.2d., Page 835, where the Court, fortunately enough, has the entire testimony of the Government witness and the questions asked as to his arrangements with an Informer.

If your Honor would like to see the questions and answers asked, I think you will see they are similar to this. This is the Government's position, that a witness can tell what if anything an informer was going to do in connection with the prosecution of the case at hand.

[fol. 11] Mr. Walsh: I would like to have my objection include also that it is just the rankest hearsay, any conversation or——

Mr. Emanuelson: He has not given any conversation.

Mr. Walsh: The result is exactly the same.

Mr. Emanuelson: He has not given any conversation.

Mr. Walsh: Just a minute, counsel. The result is exactly the same, if your Honor please. When he says, "I made arrangements with" or "As a result thereof", he is in that fashion obviously putting in hearsay conversation at which the Defendant was not present.

The Court: You may proceed.

By Mr. Emanuelson:

Q. Will you continue, please?

A. I made arrangements to meet John Doe on August 12th, 1954 at 5:00 p.m. at 75th and Prairie Avenue in Chicago.

Q. All right. What happened after that? I am referring to August 12th, 1954.

A. At 5:00 p.m., after I arrived at 75th and Prairie Avenue with Detectives Bryson and Sims, John Doe was told to get out of his car——

Mr. Walsh: I object to this. This certainly is conversation.

[fol. 12] Mr. Emanuelson: You have not heard anything that John Doe said. You have heard only what this man said.

Mr. Walsh: Well, he cannot tell us what he said out of our presence, either. It is self-serving. If you want to take it from that point of view, it is certainly elementary that he may describe actions, but he certainly cannot go

into conversations out of our presence. We have no possibility of cross examining him about these things.

Mr. Emanuelson: Well, your Honor, if we wanted to go far enough——I do not think it is important, but if we wanted to go far enough we could cite the Landry case, 155 Fed. 2d, where with respect to co-conspirators, though they be not charged with conspiracy—it was a case of husband and wife—we could put in the conversation and the facts that took place prior to the actual consummation of the crime.

Mr. Walsh: Well, only——

Mr. Emanuelson: I do not think it is important.

Mr. Walsh: Only if they were in furtherance of a conspiracy.

By Mr. Emanuelson:

Q. You just tell what happened, Mr. Durham.

A. John Doe got out of his automobile and stood on [fol. 13] the sidewalk beside his car.

Mr. Walsh: What time was this?

The Witness: Approximately 5:00 p. m. that date.

By Mr. Emanuelson:

Q. August 12th?

A. August 12th, 1954.

Q. All right.

A. Myself and Detective Bryson then proceeded to search this 1954 Cadillac sedan. We searched the glove compartment, under the dashboard and any ledges that were part of the dashboard itself, that is, the instrument panel, above the sun visors, under the cushions of the seats, the floor mats and door panels, and then we opened the trunk and searched that.

Following the search of the automobile Detective Sims re-entered the automobile with John Doe and then searched the person of John Doe in the presence of myself and Detective Bryson.

After that Detective Bryson and myself went with Detective Sims and John Doe, entered the Cadillac sedan which was then driven by Detective Bryson, and Detective

Bryson drove to the Tivoli Theatre located on Cottage Grove, on the east side just south of 63rd Street.
[fol. 14] At that point Detective Sims and John Doe left the Cadillac automobile and entered the theatre. Detective Bryson and myself drove away, and returned to 75th and Prairie Avenue where I left the Cadillac automobile.

Detective Bryson then drove away in the Cadillac and I entered a Government automobile operated by myself and proceeded to my premises, that is, my residence.

Q. After that what happened, if anything?

A. At approximately 9:30 p.m. the same date, Detective Bryson accompanied by Detective Sims and John Doe drove to 75th and Prairie Avenue——

Mr. Walsh: Is this in his presence, or is it something he knows?

The Witness: Yes, sir.

Mr. Walsh: Were you with them?

The Witness: Yes.

Mr. Walsh: Excuse me.

By Mr. Emanuelson:

Q. Could you describe that in a little more detail?

A. Yes.

Q. Do you mean now that you met them there?

A. I met them there.

[fol. 15] Q. Or did you see them drive up?

A. I was already there with Agent James Fields.

Q. What you mean to say is that you saw them drive up?

A. I saw the car in motion.

Q. Would you state that for the record, please.

A. Yes. I saw the Cadillac automobile in motion, again operated by Detective Bryson, and Detective Sims and John Doe were riding as passengers.

When Detective Bryson stopped the Cadillac automobile, both he, Detective Sims and John Doe left the Cadillac automobile and stood on the sidewalk. Agent Fields and myself again searched the Cadillac automobile, and then I searched the person of John Doe.

I might go back to 5:00 p.m. I had prepared a strip of

metal, a sheet of tin, galvanized tin, that would slip down on the inside of the trunk lid of this Cadillac, which would thereby prevent the catch from locking the lid on the trunk.

Q. Will you stop there just a moment, please.

A. Yes.

Mr. Emanuelson: Mr. Reporter, will you mark this as Government Exhibit 1 for identification, please.

(A piece of metal was thereupon marked Government's Exhibit 1 for identification.)

[fol. 16] By Mr. Emanuelson:

Q. I show you Government Exhibit 1 for identification.

A. Yes.

Q. Is this the strip of metal you just referred to?

A. Yes.

Mr. Emanuelson: Do you want to see this, Mr. Walsh?

(Mr. Emanuelson handed Government's Exhibit 1 for identification to Mr. Walsh.)

Mr. Emanuelson: We offer that in evidence, your Honor.

Mr. Walsh: I object to it. There is no relevancy so far to the charge.

The Court: We will withhold our ruling on that.

Mr. Emanuelson: We will offer them all at once, your Honor.

The Court: All right.

By Mr. Emanuelson:

Q. Will you continue, please, Mr. Durham?

A. At that time I also looped a small loop of rope, clothesline type rope, through openings in the trunk lid.

Now, at 9:30 p.m. that same date after searching the automobile, the 1954 Cadillac, and John Doe, Detective [fol. 17] Bryson then entered the trunk of that 1954 Cadillac.

John Doe then got behind the driver's wheel of the Cadillac and Detective Sims entered the front seat, that is, on the passenger's side of that Cadillac, along with John Doe, and they proceeded to drive away from the area, and around the block, returning——

Q. From where?

A. From 75th and Prairie.

Q. To where?

A. They just drive around the block and returned in approximately a minute and a half or two minutes.

Q. All right.

A. After that Detective Sims left the automobile and joined Agent Fields who was driving the Government automobile. I entered another Government automobile which was parked behind John Doe. John Doe remained seated in the Cadillac.

Agent Fields and Detective Sims then drove away, followed by John Doe. I followed immediately behind John Doe. The three automobiles, including the one driven by myself, turned east on 75th Street and proceeded east to St. Lawrence, and then turned north on St. Lawrence.

[fol. 18] We reach 70th Street—I beg your pardon— 70th Place. Agent Fields pulled over to the east side of St. Lawrence, approximately two to three car lengths north of 70th Place, and John Doe proceeded to pass Agent Fields and parked his automobile on the east side of St. Lawrence just opposite 70th Street.

Q. Would you tell us what you mean by "just opposite"? Do you mean, where the street intersects, opposite the corner of the intersection?

A. Yes, sir. 70th Street runs from the west to St. Lawrence, to the west side of St. Lawrence and stops. It does not continue across——

Q. It does not go through?

A. (Continuing)—and continue east of St. Lawrence. On the east side of the street is a railroad over-pass and a vacant lot, and the street is blocked from continuing through by a vacant lot, the railroad, and a fence bordering the lot.

As John Doe parked opposite 70th Street, I pulled just about one car length beyond John Doe, put the automobile in reverse and backed into 70th Street. I then parked just west of the crosswalk on the south side of 70th Street with the front of my automobile facing St. Lawrence and facing [fol. 19] directly the Cadillac in which John Doe was then seated.

We arrived at the scene at approximately ten p.m. At approximately 11:05 p.m. a 1951 Pontiac sedan bearing 1954 Illinois License 1-326-771, driven by the Defendant Albert Roviaro, drove up from a southerly direction on St. Lawrence headed north, and pulled in approximately one car length behind the automobile in which John Doe was then seated.

Albert Roviaro was at that time accompanied by an unknown man. This unknown man was riding as a passenger. After parking the Pontiac sedan, Albert Roviaro opened the door on the driver's side, stepped out and walked approximately two-thirds of the way from the Pontiac to the Cadillac and then turned back facing the Pontiac and made a motion with his hand.

He then continued on, stepped up on the curb, and walked to the passenger side of the Cadillac, opened the front door and took a seat on the front with John Doe.

At that point the 1951 Pontiac sedan in which the unknown man was still seated—the unknown man moved over and took the position in front of the driver's wheel and started the motor and proceeded to drive.

He made a sharp turn west into 70th Street and disap- [fol. 20] peared from view. As he disappeared from view the 1954 Cadillac driven by John Doe started up, and with the Defendant, Albert Roviaro, seated beside John Doe, proceeded north on St. Lawrence.

Agent Fields, who at that time had been parked approximately 100 feet behind, and who was accompanied by Detective Sims, started up from the curb and followed John Doe and Albert Roviaro.

The Cadillac continued north on St. Lawrence to South Chicago Avenue. I then started up the Government automobile operated by myself and fell in behind Agent Fields. The Cadillac turned southeast on South Chicago Avenue. Agent Fields turned in the same direction behind the Cadillac and I turned in the same direction behind Agent Fields.

The Cadillac continued southeast along South Chicago Avenue to a point at which South Chicago Avenue bisects Cottage Grove on a diagonal at 71st. All three automobiles were halted by a red light. The light changed to green and the Cadillac then proceeded to turn right and south on Cottage Grove.

Agent Fields turned south with the automobile and I turned south following Agent Fields. The Cadillac reached a position at 72nd and Cottage Grove, made a right [fol. 21] turn and slowed down almost to a stop, at which point Agent Fields continued south on Cottage Grove.

The Cadillac then slowly proceeded west on 72nd Street. I reached the corner and could see the Cadillac. I turned off my headlights, pulled over to the curb, and the Cadillac continued west to Evans.

Approximately a short block west of Cottage and just west of Evans, the Cadillac pulled over to the curb and turned off the lights—that is, the red tail lights went out. The Cadillac remained there for possibly a minute to two minutes, and again started up, turning on the lights.

As the Cadillac started up I turned the corner west on 72nd Street and then turned on the headlights of my automobile. The Cadillac proceeded west to Champlain, just three blocks west of Cottage, turned south on Champlain, and at that time I was following the Cadillac approximately three to four car lengths behind.

As the automobile turned south into Champlain, I turned off my headlights and made a left turn south into Champlain behind the car, still maintaining a distance of approximately three car lengths.

[fol. 22] The Cadillac proceeded south to 74th Street. As the Cadillac made its turn I pulled over to the curb, turned off my headlights and immediately started off again, maintaining approximately the same distance behind the Cadillac.

I reached the corner with my headlights off and made a partial turn into 74th Street, and as I did the Cadillac pulled over to the curb on 74th Street just west of an alley that runs approximately mid-way north-and-south between Champlain and St. Lawrence.

As the Cadillac pulled over to the curb just beyond the alley, the front door opened and Albert Roviaro, the Defendant, stepped out of the automobile.

Just west of that alley at a point to where the automobile stopped, there is a tree, and close to that tree a street light which is operated by the City of Chicago, a short distance away.

The street light lights an area of approximately 20 to 25 feet, or a radius of approximately 20 to 25 feet, it is my recollection, around that lamp, including an area west of the lamp—or east of the lamp, and across the alley and west of the lamp going towards St. Lawrence.

I had a clear vision of Albert Roviaro, and as he stepped [fol. 23] from the Cadillac, he stepped over to the tree, leaving the door of the Cadillac open. He stooped down by the tree and picked up a package, a small package—I could not tell the physical characteristics of it at the time—and laid this package in a position which would be approximately equal to the height of the front seat, and without closing the door of the Cadillac Albert Roviaro made a motion with his hand to John Doe and then turned and walked west towards St. Lawrence Avenue.

Q. Where were you at this time?

A. I had parked the Government automobile approximately three car lengths west of Champlain on the north side of 74th Street under a large tree, a tree shaped in the form of an umbrella tree, except it was a much larger tree, and I had slid over on the front seat to the passenger side, opened the door on that side and stepped out onto the sidewalk and was looking in a direction down to the tree and the lightpost.

Q. What was the condition of the weather?

A. It was a clear night. The weather was warm.

Q. Moonlight?

A. Pardon?

Q. Was there moonlight in addition to the lamplight? [fol. 24] A. Yes, there was.

Q. What happened after that?

A. As Albert Roviaro moved away from the Cadillac I immediately proceeded to walk towards the Cadillac, and as I approached the Cadillac I saw a package lying on the floor just beyond the edge of the seat at approximately a position which would be a running board with the door sitting open. There is a metal strip there which is sort of a step, stepping in.

I picked up the package and knocked on the side of the automobile and then proceeded to walk west towards St. Lawrence Avenue, at which point I observed Agent Fields

and Detective Sims parked in the Government automobile operated by Agent Fields.

I reached the intersection of 74th and St. Lawrence as Albert Roviaro walked diagonally across the street and walked south on St. Lawrence, and I watched Albert Roviaro until he walked approximately two-thirds of the block south between 74th and 75th Street.

Albert Roviaro then—when he reached a position about one car length behind the same 1951 Pontiac sedan, he walked out into the street and proceeded down the street side of the parked automobiles and entered this [fol. 25] Pontiac.

Q. Where was the tree located? What kind of an area is that? Is there a vacant lot around there, or what?

A. No, sir. This tree is on the north side of 74th Street. Running along the north side of 74th Street from St. Lawrence east, there is a flat building, a two-story flat building there, which would have probably ten to twelve apartments with an entrance on both 74th Street and one on St. Lawrence Avenue.

That building runs back to a short yard behind that building. That short yard then runs to the alley and that short yard is a very short affair, probably 10 to 12 feet, possibly 15 feet in length.

The alley itself is approximately 14 to 15 feet wide, and on the east side of the alley there is a short distance which is a portion of the yard of the building that fronts on Champlain Avenue, which would be the northwest corner of Champlain and 74th.

Then there is a two-car frame garage, again a short span of yard for the private residence I just described on the northwest corner of 74th and Champlain, and that residence is a story and a half frame bungalow.

Mr. Emanuelson: Mr. Reporter, will you mark this piece of paper Government Exhibit 2 for identification, [fol. 26] please.

(The piece of paper was thereupon marked Government's Exhibit 2 for identification.)

The Witness: After Albert Roviaro entered the 1951 Pontiac and drove away, I then returned to John Doe's

automobile and found both John Doe sitting in the front seat and Detective Bryson.

Detective Bryson and John Doe then drove away, followed by myself in the Government automobile. I still had the package in my possession.

Agent Fields and Detective Sims followed me, and the three automobiles then proceeded to 69th Street, just west of Cottage Grove. We stopped our automobiles there and Detectives Bryson and Sims and Agent Fields entered the automobile operated by myself.

I took this package and opened the outside wrapper, which was a dark piece of blue or purple paper. I found inside three glassine envelopes, each of which contained a white powder.

I conducted a field test of this white powder and got a positive reaction, indicating an opium derivative.

Q. Who was present when you conducted that field [fol. 27] test?

A. Agent Fields, Detectives Bryson and Sims, and John Doe.

Mr. Emanuelson: Will you mark this envelope as Government Exhibit 3 for identification, please.

(The envelope was marked Government Exhibit 3 for identification.)

Mr. Emanuelson: Will you mark this envelope Government Exhibit 4 for identification, please.

(The envelope was thereupon marked Government Exhibit 4 for identification.)

Mr. Emanuelson: And this one will be 5.

(The envelope was thereupon marked Government Exhibit 5 for identification.)

By Mr. Emanuelson:

Q. I show you Government Exhibit 2 for identification.
A. Yes.
Q. I ask you if you have ever seen that before?
A. Yes, I have.
Q. Do your initials appear thereon?

A. They do.

[fol. 28] Q. Whose other initials appear thereon, if you know?

A. Those of Agent James Fields, also, and the date, 8-12-54.

Q. When did you first see this Exhibit, Government Exhibit 2 for identification?

A. I first saw this piece of paper on the floor of the Cadillac automobile operated by John Doe immediately following the incident in which Albert Roviaro stooped down beside the tree on 74th Street between Champlain and St. Lawrence Avenue and picked up a package which was placed into the automobile of John Doe.

Q. How was the package contained?

A. There were three glassine envelopes inside of this paper. This paper was folded on the outside.

Q. How was it? Can you show us how it was?

A. Roughly, the paper was folded over in this fashion (indicating), similar to that.

Q. Did you open that——

A. With a piece of string on the outside.

Q. Did you open the package contained by this paper, Government Exhibit 2?

A. Yes, I did.

Q. Where did you open it?

[fol. 29] A. At 69th Street just west of Cottage Grove.

Q. I show you Government Exhibit 3 for identification.

A. Yes.

Q. I ask you if you have ever seen that before?

A. Yes, sir.

Q. Where did you see that?

A. I first saw this glassine envelope on 69th Street west of Cottage Grove in Chicago on August 12th, 1954.

Q. Is this one of the envelopes you just referred to?

A. Yes, it is.

Q. I show you Government Exhibit 4 for identification and ask you if you have ever seen that before?

A. Yes, sir. I saw this at the same time I saw this other one, this other Exhibit.

Q. I show you Government Exhibit 5 for identification and ask you if you have ever seen that before?

A. Yes. I saw this at the same time I saw the other Exhibits.

Q. Will you look at Government Exhibits 3, 4 and 5 and tell the Court if any initials other than your own are on there?

A. Yes, sir.

Q. When were they placed on there, if you know?

[fol. 30] A. These initials were placed on here the same night at Police Headquarters at 11th and State Street.

Q. Who was present at that time?

A. Myself, Agent Fields, Detectives Bryson and Sims, Albert Roviaro and John Doe.

Q. Now, was there any contents in these glassine envelopes which you have identified?

A. Yes, there was.

Q. What was it?

A. White powder——

Mr. Walsh: I object to this, now; unless he is able to give this testimony of his own knowledge. I assume you have some chemistry.

Mr. Emanuelson: We will get to the chemistry. I am just asking him if it contained anything. I am not asking him what it contained.

Mr. Walsh: All right.

Mr. Emanuelson: I am asking him if it contained anything.

By Mr. Emanuelson:

Q. Did it contain anything?

A. Yes. They each contained white powder.

Q. What did you do with that white powder that was in the envelopes?

[fol. 31] A. At that time or afterwards?

Q. At that time, the first time you saw it, the very first time you saw it.

A. I field tested the contents.

Q. You said that.

A. Yes, sir.

Q. After you finished the field test, what did you do then?

A. The envelopes were then retained by myself and after that, with John Doe in custody——

Mr. Walsh: Well, now, I object to this.

By Mr. Emanuelson:

Q. Just tell us what you did.

A. I kept those in my possession.

Q. Until when? When did you release them from your custody?

A. Just before Detectives Bryson and Sims, Agent Fields and myself, along with John Doe, proceeded out to the vicinity of 105th Street and Forest Avenue in Chicago.

Q. Then what happened after that?

A. They were placed——

Q. You proceeded out to 105th Street?

A. Yes, sir.

Q. What happened after that, if anything?

[fol. 32] A. Agent Fields——

Mr. Walsh: Just a moment. Proceeded to 105th Street from where?

A. From——

Mr. Emanuelson: From the last location where he had possession of the narcotics at 69th—what was the address? I am sorry.

The Witness: 69th Street, over on Cottage Grove.

By Mr. Emanuelson:

Q. You are saying that from there you proceeded to 105th and what?

A. Forest Avenue.

Q. Who proceeded there?

A. In Agent Fields' automobile which was operated by Agent Fields, there were also John Doe and Detective Sims.

Detective Bryson went with me in the Government automobile, and we parked both automobiles on 105th Street just east of Forest Avenue—I beg your pardon. I am in error. I moved a little too fast.

We drove to the vicinity of 105th and Forest Avenue

and continued on from there to the vicinity of 125th and Michigan Avenue, and also *the* the vicinity of 110th Street east of Halsted.

[fol. 33] Q. What happened after that?

A. We then returned, both automobiles, to 105th Street and parked on 105th just east of Forest Avenue.

Q. Who was in the automobile?

A. In the automobile with Agent Fields was Detective Sims and John Doe. In my automobile was Detective Bryson.

Q. All right.

A. Agent Fields remained in his automobile, and John Doe remained in the custody of Agent Fields. Detectives Bryson and Sims——

Mr. Walsh: Did you say "in the custody"?

The Witness: He was with Agent Fields.

Mr. Walsh: All right. Go ahead.

The Witness: Detectives Bryson and Sims and myself then went to the front door of 10459 Forest Avenue, the residence of Albert Roviaro, the Defendant.

I rang the doorbell. Roviaro came to the front door in pajama bottoms, stripped to the waist. He opened the front door—there was a screen-storm job there—and he asked, who was it? I held up a badge and identified myself as a Federal Officer.

Roviaro then opened the screen door and said, "Come in." We went inside and he says, "What is [fol. 34] it?"

I says, "You are under arrest." Agent—Detectives Bryson and Sims had identified themselves. Rovario asked the circumstances of the arrest, and I very briefly related to him the circumstances under which we had observed him riding with John Doe and the picking up of this package on 74th Street.

We looked upstairs on the second floor and in the basement in an attempt to see if the unknown man was in the house that had accompanied Roviaro previously, and——

Mr. Walsh: Well, I object to what his purpose was. He can tell us what he looked at and what he found. I have no objection to that.

The Court: Proceed.

The Witness: In the meantime Albert Roviaro put on his clothes. After he was fully dressed Roviaro, Detective Bryson and Sims and myself left the premises.

Detective Sims rejoined Agent Fields and then Detective Sims drove the Government automobile operated by myself—Agent Fields drove away with John Doe and Detective Bryson and myself and Roviaro entered the 1951 Pontiac sedan of Roviaro. I drove the Pontiac——

[fol. 35] By Mr. Emanuelson:

Q. Where was the Defendant Albert Roviaro sitting?

A. On the front seat. I sat at the driver's wheel, Roviaro sat next to me, Detective Bryson sat next to Roviaro. All three of us were in the front seat.

Q. All three of you in the front seat?

A. Yes.

Q. All right. Continue.

A. I then drove north on For-st Avenue to 104th, east on 104th to South Parkway—I beg your pardon. That is in error.

I drove west to State Street and then turned north on State and continued north on State all the way to the Police Headquarters at 11th and State Street.

On the way in I had the following conversation with Roviaro, along with remarks made by Detective Bryson in the presence of the Defendant:——

Q. Where did this take place?

A. In the automobile of Roviaro.

Q. You were proceeding on State Street?

A. Yes, sir.

Q. Is that right?

A. That is correct.

Q. North?

[fol. 36] A. Going north.

Q. North on State Street?

A. That is correct.

Q. You were all in this automobile belonging to the Defendant?

A. That is right, sir.

Q. Will you tell us what he said to you and what you said to him, if anything?

Mr. Walsh: I object to this, unless—if this is intended to be a confession, I object. I think there ought to be some showing it is voluntary.

Mr. Emanuelson: It is not a confession. It is admissions made by the Defendant.

Mr. Walsh: Well, admissions are confessions.

The Court: You may proceed.

Mr. Walsh: Your Honor, I think the Government should be required to make some showing, if this is a confession, that it is voluntary.

Mr. Emanuelson: It isn't—I don't think we should——

Mr. Walsh: If it isn't, I don't see what it is for.

Mr. Emanuelson: Prior to the testimony of the witness I do not think we should characterize what it is.

The Court: You may proceed, counsel.

The Witness: I said to——

[fol. 37] Mr. Walsh: Do I understand the objection is overruled?

The Court: Yes.

The Witness: I said to Roviaro, "Chick", which is a name Roviaro is known also as, an alias—I said, "Are you going to take this by yourself or are you going to name your connection?"

Mr. Walsh: I object to that and move to strike that portion of the testimony about a name under which Roviaro is also known. That is something which is not an admission by the Defendant.

It is obviously self-serving testimony by this witness in an attempt to prejudice the defendant.

Mr. Emanuelson: We will withdraw that question and just let the witness state what he said to him without characterizing it, or saying what his name was.

By Mr. Emanuelson:

Q. Just what did you have to say to the defendant, Albert Roviaro, at the time you last described?

A. I said, "Are you going to take this by yourself, or are you going to name your connection?"

Mr. Walsh: I object to this.

Mr. Emanuelson: I do not see that there is any ground for an objection.

[fol. 38] The Court: Proceed.

Mr. Emanuelson: That is the statement he made to him.

The Witness: Roviaro said to me, "What's the sense in getting anybody else in trouble? I stood up twice before, and I'll take it this time."

Mr. Walsh: Now, your Honor, I think the obvious indication is here. This is an attempt to get in something that is not a confession as a confession.

The Court: You may proceed.

The Witness: Detective Bryson asked Roviaro—rather, he said to Roviaro, "Suppose your children got hold of some of this stuff out here. How would you like it?" He says, "I should put you in a tank down at 11th Street with some of those people who are sick and wanting the stuff."

Mr. Walsh: Was that a threat, Mr. Witness?

The Witness: No, sir.

Mr. Walsh: Now, Judge, I cannot see the purpose of this conversation. If they have a confession, they have a confession. If they haven't, this is purely poetry for the purpose of prejudice against the Defendant.

Mr. Emanuelson: These are the statements that were made, the conversation had.

[fol. 39] The Court: You may proceed.

Mr. Emanuelson: It was in his presence.

The Witness: Roviaro said, "Well" he said, "I hadn't thought about it like that." He says, "A guy just takes a chance and tries to make a buck."

We proceeded then to 11th and State and went to the headquarters of the Narcotics Bureau on the third floor and into one of the interrogations rooms.

Present in the interrogation room at that time was myself, Agent Fields, Detectives Bryson and Sims, Albert Roviaro and John Doe.

Detective Bryson removed from his pocket the same wrapper containing the three glassine envelopes and placed them on a desk, at which time in the presence of Roviaro, myself, Agent Fields and Detectives Bryson and Sims initialled the three glassine envelopes.

By Mr. Emanuelson:

Q. Who was the detective who had the three envelopes?

A. Bryson.

Q. When did he get them?

A. He got them from me on 69th Street just west of Cottage, just prior to going to the residence of Albert Roviaro.

Q. Continue.

[fol. 40] A. After placing our initials on the packages, the packages then were retained by Agent Fields and Detective Bryson again asked Roviaro, was he going to take this——

Mr. Walsh: I object to this, your Honor.

The Court: You may proceed.

The Witness: He again asked Roviaro, was he going to take this by himself or was he going to name the connection, the man for whom he was working, and Roviaro says, "No, you are wasting your time."

Mr. Walsh: I object to this. It presupposed he is working for someone. There are just a dozen things in the record that are not properly there. I cannot see that this conversation is——

Mr. Emanuelson: If you can show it is not material or it is not relevant that is something else, but unless you can deny that Detective Bryson said it, I do not see how you can keep it out of evidence.

Mr. Walsh: But——

Mr. Emanuelson: You may object to it, but——

The Court: Proceed.

The Witness: Roviaro then said, "No, you are wasting your time. There's no use asking me about anybody else."

He says, "I told you before I stood up twice before [fol. 41] and I'll stand up again."

Roviaro then said, "Besides that, you have got to convict me anyhow", and at that point we ceased questioning the Defendant any further.

Mr. Walsh: Now, your Honor, I move to strike all this conversation. That is all, apparently, and it is as far as it went.

Now, obviously that conversation doesn't amount to a

confession, it does not amount to an admission, it does not amount to anything. It is strictly introduced here for the purpose of prejudicing your Honor.

If it had been in the presence of the Jury I would say it would be reversible error. It is obvious that it is for the purpose of ruining the Defendant. It does not amount to a confession or an admission of guilt at all.

Mr. Emanuelson: Well, he had admitted by his own statements, from what the witness said, that he stood up twice before. Notwithstanding that, your Honor, the Defendant did not have to make these statements. He made this statement himself.

Mr. Walsh: After they told him they were going to put him into the tank with a bunch of narcotics.

[fol. 42] The Court: Proceed.

Mr. Walsh: It is with the understanding that the objection is overruled and your Honor will consider this matter?

The Court: I may rule it out; I do not know.

Mr. Emanuelson: You are reserving your decision?

The Court: Yes.

By Mr. Emanuelson:

Q. What happened after that?

A. After that Agent Fields and myself left Police Headquarters, at which time the package containing the three glassine envelopes were still in the possession of Agent Fields.

I met Agent Fields again at approximately 9:00 a.m. that morning. Incidentally, by the time we had completed the work at 105th and Forest Avenue it was in the A.M. of August 13th, 1954.

At approximately 9:00 A.M. I met Agent Fields in the Federal Bureau of Narcotics, in the New Post Office, and shortly after that Albert Roviaro was brought in by two Police Officers and from there Albert Roviaro was taken to the Office of the United States Marshall.

Agent Fields removed the contents from these three [fol. 43] glassine envelopes and placed the contents in new glassine envelopes. Those glassine envelopes were then placed inside of a lock-sealed envelope by Agent Fields

and delivered to the United States Chemist in the New Post Office Building.

Mr. Emanuelson: Will you mark this envelope as Government's next Exhibit for identification.

(The envelope was thereupon marked Government Exhibit 6 for identification.)

Mr. Emanuelson: Will you mark this envelope as Government Exhibit 7 for identification.

(The envelope was thereupon marked Government Exhibit 7 for identification.)

Mr. Emanuelson: Your Honor, let the record show that I am removing Governments Exhibit 6 for identification, which appears to be a manila envelope and which has been opened. I will show the inside to your Honor and show it to counsel.

Mr. Walsh: There is nothing in it.

Mr. Emanuelson: Nothing in it.

By Mr. Emanuelson:

Q. I show you again Government Exhibit 6 for identi- [fol. 44] fication and ask you if you have even seen it before?

A. Yes. I saw this envelope on the 13th of August, 1954, in Suite 817, New Post Office, in the Office of the Bureau of Narcotics.

This envelope was prepared by Agent James T. Fields in my presence, after which Agent Fields lock-sealed this envelope.

I then tested the sealing of the envelope. I so indicated by initialling the back and putting the date on there.

Q. Is it dated?

A. Yes; 8-13-54.

Mr. Emanuelson: Your Honor, may the record show I am opening Government's Exhibit 7 for identification, appearing to be a manila envelope with the number 42620-42622, dated 8-23-54.

May the record also show I am abstracting the contents, being three glassine envelopes, and I ask the Reporter to

mark them Government's Exhibits 8, 9 and 10 respectively for identification.

The three glassine envelopes were thereupon marked Government's Exhibits 8, 9 and 10 respectively for identification.

Mr. Walsh: Counsel has not ask me to stipulate regarding [fol. 45] what the chemist would testify to, so I have no indication as to what he would testify to, but usually in the past I have agreed.

Mr. Emanuelson: I told Mr. Walsh that apparently I wasn't as good a friend of his as Ed Calihan, because he stipulates with Ed Calihan.

Mr. Walsh: Mr. Calihan asked me to.

Mr. Emanuelson: Well, it does not matter.

Mr. Walsh If you will show me the chemist's report, perhaps we can agree, to save some time, that if he were called he would so testify.

Mr. Emanuelson: All right.

By Mr. Emanuelson:

Q. Do you have the original?

A. Agent Fields has the original.

Mr. Emanuelson: I will get it from Fields.

The Court: We will take a short recess, gentlemen, and then resume.

(Whereupon a short recess was taken, after which the following further proceedings were had herein, to-wit:)

The Court: Proceed.

Mr. Walsh: I will stipulate that the chemist, if called, would testify—to what, now?

[fol. 46] Mr. Emanuelson: That part of it (indicating). If the chemist were called he would testify with respect to Government Exhibits 8, 9 and 10 for identification, Chemists Nos. 42620, 42621 and 42622—he calls this Exhibit 1 on the Chemist's Report—That the Chemist's Report of Analysis shows that Lab. 42620 assayed 80.3 per cent heroin calculated as heroin hydrochloride monohydrate and 6.4 per cent morphine calculated as morphine hydrochloride; and that the diluent is principally non-reducing sugar (sucrose).

Then he has a note:

"Morphine as calculated may be due to badly acetylated morphine."

The report is signed by John W. Fonner.

Mr. Walsh: All right. It is stipulated by the Defendant, by his attorney, that the Chemist, John Fonner, if called would testify he had examined these Exhibits and that the stated facts were the result of his examination.

The Court: Very well.

By Mr. Emanuelson:

Q. I show you Government Exhibits 8, 9 and 10 for identification and ask you if you have ever seen those before.

[fol. 47] A. Yes, sir.

Q. As to each Exhibit.

A. Exhibit 42620 through 42622——

Q. You have to give the Government Exhibit Numbers or the Reporter will not be able to identify them.

A. Government Exhibits 8, 9 and 10.

Q. If you want to see what number each Exhibit is, just look at them there.

A. Government Exhibit 8, the Chemist's number is 426— I beg your pardon. They are improperly numbered. They do not follow in sequence.

Q. Yes, they do.

A. 42620, 42621 and 42622.

Q. Well, you just give the Exhibit number.

A. Government Exhibit 9, bearing Chemist's No. 42620 is a package containing white powder placed in this glassine envelope by Agent Fields on 8-13-54.

Q. Did you see him do that?

A. Yes, sir, I did.

Q. All right.

A. That having been removed from Government Exhibits 3, 4 and 5, and also Government Exhibit 10, bearing Chemist's No. 42621, and also the contents of one of the envelopes bearing Chemist's Exhibit Nos. 3, 4, and 5, transferred [fol. 48] by Agent Fields on 8-13-54 from original container.

Government Exhibit 8, bearing Chemist's No. 42622, contains white powder transferred by Agent Fields from original containers, from Exhibits bearing Government Nos. 3, 4, and 5, on August 13th, 1954, by Agent Fields in my presence.

These three packages—Agent Fields placed his initials on those packages in my presence and I placed my initials on these packages at the same time. These three packages have been placed in a lock-sealed envelope by Agent Fields, this envelope marked Government Exhibit No. 6.

This envelope was sealed by Agent Fields, the proper form prepared and the form and that Exhibit marked Government Exhibit 6 delivered by Agent Fields to the United States Chemist in Chicago on August 13th, 1954.

Q. Would you look at the reverse side of Government's Exhibit 6?

A. Yes.

Q. Being a manila envelope.

A. Yes.

Q. Do your initials appear thereon?

[fol. 49] A. Yes. In my presence Agent Fields placed on the rear of this envelope, "Weighed and sealed, 2 ounces 389 grains, August 13, 1954, by J. T. F."

I then underneath that flap wrote, "Witnessed, 8-13-54", and I placed my initials, "N. M. D."

Q. Directing your attention to Government Exhibits 8, 9 and 10 for identification, when did you see the substance that is contained in those three envelopes the first time you saw them?

A. The substance itself?

Q. Yes; the substance itself.

A. On 69th Street, west of Cottage Grove——

Q. What was——

A. —on August 12th——

Q. I am sorry. Go ahead.

A. —on August 12th, 1954, in the city of Chicago, Illinois.

Q. What was it contained in, if you know?

A. In these three glassine envelopes.

Q. You are referring to Government Exhibits 3, 4 and 5 for identification, is that right?

A. 3, 4 and 5, and then in turn were inside of this blue-purple wrapping paper, which is—I cannot quite see the Exhibit number on there—the Exhibit marked [fol. 50] Government Exhibit No. 2.

Q. Now, will you tell the Court in what condition these envelopes were when you first saw them? I am referring now to Government Exhibits 3, 4 and 5 for identification.

A. Well, Government Exhibits 3, 4 and 5 were clear glassine envelopes. Each contained a quantity of white powder.

The top flap had been folded over and held together by staples, the type of staples used in a stapling machine.

Q. Except for the filing envelope were they in the same condition then they are now, other than the substance being enclosed therein?

A. Yes.

Q. In other words, they had no stamps on them, Government stamps on them?

A. That is correct.

Q. Is that right?

A. That is correct, sir.

Q. I show you Government Exhibit 7 for identification, being a manila envelope with the number 42620-42622.

A. Yes, sir.

Q. Will you tell the Court how I came into possession [fol. 51] of that envelope?

A. Yes. This morning at 8:30 a.m. I appeared at the laboratory of the Alcohol & Tobacco Tax Unit, and upon request for this package it was delivered to me by the Clerk in charge of that office.

That was removed from the vault in the rear of the laboratory and I signed a slip for this and this was placed in my possession.

Q. Was it sealed at that time?

A. Yes, it was, sir, and attached on the outside on the envelope prepared by Agent Fields.

Q. Was it in the same sealed condition that you brought it into this Court House this morning?

A. Yes, sir, it was.

Q. Was it in the same condition when you delivered it to me?

A. It was, sir.

Q. And that was in this Court Room at ten o'clock this morning, is that right?

A. That is correct, sir.

Q. Now, with reference to the three Exhibits 8, 9 and 10, at the time you first saw this package which you said was enclosed in this blue paper material, being Government Exhibit 2, did you at that time, see an Order of the Secretary of the Treasury?

[fol. 52] A. No, sir.

Mr. Walsh: At that time did he what?

Mr. Emanuelson: Did he see one.

Mr. Walsh: Where?

Mr. Emanuelson: Anywhere with the package or on the seat of the car. I said, at the time he first saw the package.

Mr. Walsh: Well, I submit it would not be relevant, Judge, as I assume that what he is getting at is that the narcotics were not delivered subject to a written order form prescribed by the Secretary of the Treasury and the order form presumably would go to whoever delivered the package, and the deliverer was not there according to what we have in the record so far.

Mr. Emanuelson: Well, he testified he saw him go down the street and he was, as I understand it, moving not slowly, let's put it that way, and I asked him if he saw one.

He could have had it in his hand, so naturally the next question I am going to ask him is, "Did you give one to John Doe?"

Mr. Walsh: Whether he gave one to John Doe?

Mr. Emanuelson: Did he give one to John Doe.

Mr. Walsh: All right. Excuse me.

[fol. 53] Mr. Emanuelson: Now, Mr. Durham——

Mr. Walsh: I just do not think it proves it. It is not relevant from that point of view.

The Court: Proceed.

By Mr. Emanuelson:

Q. Your last answer was that you had not seen such an order form as prescribed by the Secretary of the Treasury?

A. That is correct.

Q. Is that right?

A. That is right.

Q. Now, did you furnish such to John Doe on any of these dates? I am referring to these dates during the month of August, 1954.

A. No, I didn't.

Q. Now, did all of these things you have testified to occur in Chicago, Illinois within the jurisdiction of this Federal Court, the United States District Court for the Northern District of Illinois, Eastern Division?

A. That is correct, sir.

Mr. Emanuelson: Your Honor, how long are you going to be in Session?

The Court: Until 12:30.

Mr. Emanuelson: That is all. You may cross examine.

[fol. 54] Cross Examination.

By Mr. Walsh:

Q. How long were you at 105th and Forest on the night of August 12th, 1954?

A. At the——

Q. That is, at the home of the Defendant.

A. At the home of the Defendant?

Q. Yes.

A. Approximately twenty to thirty minutes.

Q. What time did you arrive there?

A. I arrived there at about 12:30 a.m.

Q. 12:30?

A. Yes, sir, on the 13th of August.

Q. Had you been there prior to that date?

A. Are you speaking of inside the premises or outside?

Q. Inside or outside.

A. Outside, yes, sir.

Q. You had seen the Defendant leave there?

A. Yes, sir.

Q. So you knew where he lived August 12th, 1954?

A. Yes, sir.

Q. When did you first see the Defendant that night?

A. That night?

Q. Yes.

[fol. 55] A. On August 12th, you are referring to?

Q. Right.

A. I first saw the Defendant on St. Lawrence when he drove up in the 1951 Pontiac sedan and parked approximately one car length behind the automobile of John Doe.

Q. At what time?

A. About 11:05 p.m.

Q. Now, how long prior to that was it that John Doe and you and the other Agents took positions at that place, at 73rd and—was it it 73rd or 71st?

A. We took positions—I don't think I follow you, sir.

Q. Well, you took positions before the Defendant's car arrived——

A. That's right.

Q. —isn't that the testimony?

A. Yes, sir.

Q. How long were you in those positions?

A. Well, I think I am confused on the streets. You mean at 70th and St. Lawrence?

Q. Yes.

A. Oh. Well, approximately an hour and five minutes.

Q. So you arrived there at ten p.m.?

A. About ten p.m., yes, sir.

[fol. 56] Q. Now, you say that Agent Bryson—it is a Police Officer, isn't it?

A. Police Officer; that's right, sir.

Q. Of the City of Chicago?

A. Yes, sir.

Q. Bryson, B-r-y-s-o-n?

A. B-r-y-s-o-n.

Q. Was he the man that was in the trunk of the car, you say?

A. Yes.

Q. Was he in the trunk all this time?

A. Yes, sir.

Q. Did you approach that car at all during that hour and five minutes?

A. No, sir, I didn't.

Q. Were you in communication with the car——

A. No, sir.

Q. —or with anyone in it?

A. No, sir.

Q. Did you see anyone else approach it?

A. No, sir, I didn't.

Q. Did you have it in view all the time?

A. Entirely, yes, sir.

Q. Now, did you watch it for the whole hour and five [fol. 57] minutes?

A. Yes, sir, I did.

Q. Where were you?

A. I was parked on the south side of 70th Street, just beyond the stop sign, a stop sign indicating a stop for traffic on 70th Street as they approached St. Lawrence, a distance of approximately 50 feet from the automobile.

Q. Is St. Lawrence a through street?

A. Yes, sir, it is.

Q. And it runs north and south?

A. That's right.

Q. 70th runs in what direction from St. Lawrence?

A. It runs west from St. Lawrence.

Q. Only?

A. That's right.

Q. It does not cross it at all?

A. No, sir, it doesn't.

Q. So you were west of St. Lawrence?

A. That's right, sir.

Q. And on which side of 70th?

A. The south side.

Q. The south side. And how far from the corner?

A. Right at the crosswalk. My front wheels were— [fol. 58] the bumper of my car was approximately even with the crosswalk line.

Q. The west end of the crosswalk line?

A. Yes, sir.

Q. So that pedestrians could still walk across the crosswalk?

A. Yes, sir; they could.

Q. Did any come across?

A. I wasn't paying any particular attention, but I imagine they would have.

Q. Well, that was directly in the line of view between you and the automobile you were watching?

A. Yes, sir.

Q. All right. Now, where were the other cars?

A. Agent Fields and Officer Sims were parked on the east side of St. Lawrence headed north, approximately 100 feet south of John Doe's automobile.

Q. And his automobile was parked directly opposite 70th?

A. Whose automobile, sir?

Q. John Doe's.

A. Yes, sir.

Q. And they were about 100 feet south of that?

A. That's correct.

[fol. 59] Q. Did any of your cars have your headlights on?

A. No, sir.

Q. Did you have any lights on inside of the car?

A. No, sir.

Q. Were you in communication with the other automobile there during the time that you were waiting?

A. No, sir.

Q. Did you leave your car at any point?

A. No, I didn't.

Q. During that hour and five minutes?

A. No, sir.

Q. Did you watch—was it Agent Fields?

A. Agent Fields.

Q. And Officer Sims?

A. And Officer Sims; that's right.

Q. They were in the other automobile parked down there?

A. Yes.

Did you see them leave that car?

A. No, I didn't.

Q. Do you know whether they did?

A. I couldn't say.

Q. You didn't watch them?

A. No, sir.

[fol. 60] Q. At any time did you see them approach the Cadillac?

A. They didn't.

Q. Was this Cadillac a Government automobile?

A. No, sir.

Q. What is Mr. Doe's name?

A. His correct name?

Q. Yes.

Mr. Emanuelson: Your Honor, we originally had that matter before your Honor as to the disclosure of his name. Defense counsel asked for it at that time, and this is just a repetition.

As I said earlier, at that time we stated to your Honor that he was an informer, and I think Mr. Walsh knows that informers work in more cases than one. We advanced that position before and your Honor ruled in the Government's favor.

The reason we do not want to reveal his name is that there are other matters that are pending, I have been told —I know of one myself—and the cases hold that we do not have to reveal the informer's name. Now, if there is some reason——

Mr. Walsh: Well, is there any activity of the informer which will be curtailed by reason of the disclosure of his name? Would you answer that?

[fol. 61] Mr. Emanuelson: Any activities?

Mr. Walsh: Yes.

Mr. Emanuelson: From this point forward, no.

Mr. Walsh: Is there any occasion upon which he will be called to testify?

Mr. Emanuelson: No.

Mr. Walsh: So that it might——

Mr. Emanuelson: I do not thing it takes much foresight to know that any narcotics case——

Mr. Walsh: Well, now——

Mr. Emanuelson: I want to advance my position. Assume he says James O'Connor is the informer, and then you have another case that comes on and they bring five witnesses who testify that James O'Connor was sitting in a tavern on that date.

Mr. Walsh: Well, now—

Mr. Emanuelson: I am not saying that is what you are going to do, but that is the avenue it opens up, and I think that is why the cases so hold, that the Government does not have to reveal the informer's name, because he is worth nothing after that.

Mr. Walsh: Well, if he was somewhere else and we can show it, then I certainly would be entitled to know it.

The Court: You can certainly show——

[fol. 62] Mr. Walsh: Your Honor, this is the point, actually: He has testified that John Doe was present at 11th and State Street with the Defendant. We know that person, We know that person. That person is dead, as I understand it.

Now, I cannot see any harm that would accrue to the Government as a practical matter, but the next question I will ask him, if he won't tell me, is this:

By Mr. Walsh:

Q. I will ask him if the person as a matter of fact was not Tebbil Holmes?

Mr. Emanuelson: Unless the Court is going to reverse its position and rule the opposite way, we are advancing the same position as we advanced before.

As I said to your Honor, with all the effort, expense and time that goes into these cases, when you once reveal an informer's name—

Mr. Walsh: There is a case in this Circuit on it. I cannot think of the name of it. Mr. Green defended it, and it arose not too long ago, and they went into this situation, and the Court of Appeals said, "Counsel now complains that the identity was never disclosed, but he never asked for it."

I want to know the identity. They have put this man [fol. 63] into action in the case. They have put John Doe into action in the case. Therefore, they have made their choice. If it is more important to keep him secret than to prosecute and disclose his identity, then they should not have disclosed it, but having disclosed it we certainly have the right to know his identity, and if he was somewhere else at that point and we can show it, as counsel says, we are certainly entitled to do that.

If that would be the situation, that would be an obvious reason for so doing.

Mr. Emanuelson: The only evidence of any weight in this case is the eye-witness' testimony of what they saw the Defendant do, and apparently no conversation involv-

ing John Doe is presently at issue, so I do not think it is necessary at all.

The Court: Well, he was not called as a witness in the case. I will sustain the objection.

Mr. Emanuelson: All right. This will come on again, because there is another point that is going to come up, but we will argue that later.

The Court: All right. Proceed.

By Mr. Walsh:

Q. Isn't the informer's name, or the person you contend [fol. 64] is an informer, who has been mentioned by the prosecutor as an informer—isn't his name Tebbil Holmes?

Mr. Emanuelson: We are back to the same situation, your Honor.

The Court: Are you objecting?

Mr. Emanuelson: Yes. I am objecting again. He is asking the same question.

The Court: I will sustain in the objection.

By Mr. Walsh:

Q. Did you ever see any handwriting by that person?

A. The informer?

Q. John Doe.

A. Not that I recall.

Q. You never saw his signature?

A. Not that I recall.

Q. Did you ever have occasion to give him money?

A. No, sir, I didn't.

Q. What model Cadillac was this car?

A. Model 62, four-door sedan.

Q. What type? Four-door sedan?

A. That's correct.

Q. Was there any opening between the trunk and the tonneau or the seat compartment?

[fol. 65] A. No.

Q. Did you examine the car to see if there was?

A. Yes, sir.

Q. As far as you could tell there was no access from one compartment to the other?

A. That's right.

Q. How thorough was your search of that automobile?

A. How thorough was the search?

Q. Yes.

A. I went through the automobile in its entirety, including an attempt to determine if the panel behind the seat was loose so that if it were loose I could examine the interior of the upholstery.

However, the metal clips holding that panel in place appeared to be pretty much the same as they would be after having come from the factory.

Q. How about that part immediately above that portion of the trunk?

A. That was examined also.

Q. Did you push against that?

A. Yes, sir. I got inside of the trunk, and I laid on my back and examined the upper portion, the stationary portion. The bulk of the top of the trunk is a lid which opens on a hinge and can be seen without going inside [fol. 66] of the trunk compartment.

Q. But in beyond that there is a portion that runs under the window ledge, isn't there?

A. Yes. There's a stationary portion of the trunk top which is above that, an area of approximately fourteen or fifteen inches.

Q. Did you make any attempt to move that?

A. To move that?

Q. Yes.

A. That's metal up there.

Q. Did you make any attempt to move it?

A. I felt up there. There's nothing but metal with a flocking type of material on it, which is directly on the metal.

Q. Was the trunk closed while you were in it at any point?

A. I wasn't in the trunk.

Q. Well, I thought you said you climbed into the trunk.

A. I just laid—I turned over backwards and put the upper portion of my torso on the floor of the trunk looking up, but I wasn't in the trunk in its entirety.

Q. Could you do that standing up?

A. I couldn't lay on my back in the trunk and stand up

at the same time. I was lying backwards looking up at [fol. 67] the upper portion of the trunk itself.

Q. You were in the trunk, weren't you?

A. My torso was, yes, sir.

Q. Well, how much of you was protruding from the trunk?

A. My legs and hips.

Q. And hips?

A. Yes, sir.

Q. Well, then, you didn't go all the way back into the trunk, did you?

A. Yes.

Q. Was there anything in that trunk—tell us just exactly what was in the trunk.

A. A spare tire, jack, jack handle and lug wrench. That's all.

Q. Is there a shelf up on the other—on the bottom of the trunk, I believe?

A. No, sir.

Q. It is a flat trunk?

A. It is a flat trunk.

Q. Runs all the way back to the seat?

A. Just a well in which the spare tire is mounted.

Q. Where is that well?

A. On the right side of the trunk.

Q. And all of the rest of the trunk is level?

[fol. 68] A. That's right—it isn't level. There is an offset. You have 42 inches from the outside portion, the metal, of flat flooring, and then there is a slight rise of approximately 5 to 6 inches and then the metal levels off again for, I believe, 10 to 12 inches.

Q. In other words, you found the back end, the back seat there to be in proper solid condition so that access from the trunk to the passenger compartment could not be obtained——

A. That is right.

Q. Is that right?

A. That is right.

Q. And everything was fastened solidly, so far as you were concerned?

A. That's correct.

Q. Did you make any attempt to hear while you were in the trunk, to hear anything that went on in the back?

A. There wasn't anyone in the automobile at that time.

Q. Did you make any attempt or test to determine whether you could?

A. At that time or subsequent to that?

Q. At that time.

A. I didn't, no, sir.

Q. And the trunk was never closed while you were in it?

[fol. 69] A. No, sir, it wasn't.

Q. And your legs and hips protruded when you put the top of your body into the trunk?

A. That's correct.

Q. How tall are you?

A. 5-10.

Q. How heavy?

A. 212 pounds.

Q. Now, you described searching John Doe and the Cadillac at about 5:00 p.m., is that right?

A. No, sir, I didn't.

Q. Well, who did?

A. I didn't search John Doe. I searched the Cadillac only.

Q. And that was at five o'clock?

A. That was at five o'clock, yes, sir.

Q. Then you searched it again?

A. Yes, sir.

Q. When?

A. At approximately 9:30 that night.

Q. How long was that before you took up your positions at 70th and St. Lawrence—is that right?

A. Yes.

Q. I seem to get these numbers mixed up, because I [fol. 70] have heard them here for the first time.

A. 70th and St. Lawrence.

Q. 70th and St. Lawrence?

A. Yes. Approximately twenty to twenty-five minutes.

Q. In the meantime Officer Bryson and John Doe, the person you described as John Doe—let's have the record be clear on this. Is John Doe the correct name of the person?

A. No, sir.

Q. Do you know that of your own knowledge?

A. Yes, sir.

Q. How do you know that?

A. I knew John Doe previous to that evening, both personally and as to his history.

Q. Did you testify before the Grand Jury?

A. Yes, sir.

Q. Did you testify regarding the activities of John Doe on August 12th?

A. Yes, sir.

Q. 1954?

A. Yes, sir.

Q. Did you disclose his name to the Grand Jury?

A. His correct name, or the name "John Doe"?

Q. His correct name.

[fol. 71] A. No, sir.

Q. Did you find anything in this Cadillac sedan when you searched it at five o'clock?

A. I don't think I follow you.

Q. Well, you searched the Cadillac at five o'clock?

A. Yes, sir.

Q. Did you find anything in it?

A. I described the spare tire, jack and handle and lug wrench.

Q. What else?

A. In the glove compartment there was a booklet put out by the manufacturer, that is, an owner's guide, and if I recall, a pair of sun glasses. I don't recall anything else in there.

Q. How about the shelf on the rear windows?

A. There was nothing back there.

Q. Did you look in the seat cushions?

A. Yes, sir.

Q. Did you take the seat cushions out?

A. The back seat cushion. The front seat cushion was stationary.

Q. The front seat cushion was stationary?

A. The cushion itself, yes, sir.

Q. What did your examination of that cushion consist of?

A. Of the cushion?

[fol. 72] Q. Yes.

A. I put my hand down in the seam between the seat cushion itself and the back rest, as far as it would go in, and then from the floor level, the space between the floor level and the bottom of the seat. Also——

Q. Did you—go ahead.

A. I made an examination of the upholstery on the seat, the front panel of the seat, the side panels and back rest, both the front uphostery and back upholstery.

Q. And you did not find there were any openings in there?

A. No.

Q. Did you make an attempt to remove the front seat cushion itself?

A. Yes, sir.

Q. And you were unable to do that?

A. That's right.

Q. What was your examination under the front seat?

A. To see if there was anything placed in that area between the floor and the seat cushion itself.

Q. What did you do?

A. I looked under there and then rolled back that portion of the rug that extended—the front rug that extended back under the seat, and also that portion of the back [fol. 73] floor rug that extended under the seat from the rear.

Q. Did you just look at that with your naked eye?

A. Yes, sir, and a flashlight.

Q. With a flashlight?

A. With a flashlight, yes, sir.

Q. Did you do that again at ten o'clock?

A. Yes, sir, I did.

Q. Now, had John Doe been in the custody, so far as you know, of Bryson——

A. No, sir.

Q. —from five until ten?

A. No, sir. He was in the custody of Sims.

Q. Sims?

A. Yes, sir.

Q. He had been in the custody of Sims?

A. Yes, sir.

Q. You said that they stopped off and went to the Tivoli Theatre.

A. That's correct.

Q. Is that right?

A. That's right,

Q. Then met you again at about what time?

A. Nine-thirty.

Q. Sims is a City Policeman, right?

[fol. 74] A. That's right, sir.

Q. Did you search Sims?

A. No, sir.

Q. Did you search Bryson?

A. No, sir.

Q. Or Fields?

A. No, sir.

Q. Who made out this envelope, Government's Exhibit 6?

A. May I see it, please?

Q. Yes.

(Mr. Walsh handed the witness Government Exhibit 6.)

A. Agent Fields.

Q. That was done in your presence?

A. Yes, sir, it was.

Q. And he consulted with you and with the others at that time?

A. Not with the others.

Q. The others present?

A. Not at the time it was sealed, no, sir; just Fields and myself.

Q. At the time it was made out?

A. (No answer.)

Q. At the time the material on its cover was made out?

[fol. 75] A. Well, I don't understand. Do you mean did he consult with me? About what?

Q. Did he talk with you about it?

A. We talked, sure.

Q. How do you account for the fact that he shows this material, whatever it is that was in the envelope, and the evidence appears to show it was heroin, was found by officer James L. Bryson at 74th and St. Lawrence Avenue, Chicago, Illinois? How do you account for that?

A. There could be an error on the part of Agent Fields. That, as I explained earlier was given by me to Officer Bryson on 69th Street just west of Cottage——

Q. Just a minute, now.

A. Yes.

Q. That is an error, isn't it?

A. Yes, sir; it is.

Q. All right. Aren't your initials on this envelope?

A. Yes, sir.

Q. And weren't they put there after this material was placed on it, or were they put on before?

A. After.

Q. And you had an opportunity to examine this, didn't you?

[fol. 76] A. Yes, sir, I did.

Q. Did you?

A. I don't recall.

Q. Well, this statement here, "Found by Officer James L. Bryson" is not consistent with your testimony, is it?

A. That is correct.

Q. Let's have the record correct, now, in case somebody wants to read it. What is correct? Tell us what is correct.

A. What you said.

Mr. Emanuelson: Well, your Honor, I object to this.

The Court: Do you object?

Mr. Emanuelson: Yes. Furthermore, the witness testified Bryson was in the trunk and he was out like that (snapping fingers) into the front seat and there was the package, so if Fields said he found it, maybe he is trying to give him some credit, I don't know, but he found it at the same time you did, and you may have seen it a split second first, but he was there at the same time you were, according to your testimony.

I would like to have the record read, but I think that is what he said.

Mr. Walsh: Well, I am cross examining him about what he said.

[fol. 77] Mr. Emanuelson: I think, so the record may be clear, that the Reporter ought to read that part.

Mr. Walsh: I want to continue with my cross examination.

The Court: Is there an objection?

Mr. Emanuelson: I did not hear your Honor.

The Court: Are you objecting?

Mr. Emanuelson: I am.

The Court: All right. Objection sustained. Proceed. It has been answered.

By Mr. Walsh:

Q. How big a man is James Bryson?

A. About 6 feet 3 inches tall, weighing about 220 pounds.

Q. Do you remember the ride, now, that you took from 105th and Forest, Roviaro's home, to 11th and State?

A. Yes, sir.

Q. The Police Station?

A. Yes, sir.

Q. What time did you start on that ride?

A. Oh, sometime between 12:30 and 1:00 a.m.

Q. He was in the middle between you during that ride?

A. Who is that?

Q. Roviaro.

A. Yes, sir.

[fol. 78] Q. Between you and the agent who was with you, or the Police Officer, isn't that correct?

A. Yes.

Q. Who was it?

A. Bryson.

Q. Where were you seated?

A. I was driving.

Q. Are you certain of that now?

A. Yes, sir.

Q. Now, did you tell us everything that was said in that conversation down at 11th and State?

A. (No answer.)

Mr. Walsh: I am cross examining on this, your Honor, on the theory that your Honor did let it in, and I want to cross examine without waiving my objection.

A. As near as I can recollect, there was a lot of conversation down there. Some of it was relative to the Defendant and some was not.

By Mr. Walsh:

Q. Was there any other conversation on this ride than what you have described?

A. There was some conversation. There was some conversation between Bryson and myself and there was conversation with the Defendant about his means of livehood [fol. 79] and family status.

Q. What did he tell you?

A. He said he was employed by some bottling company. I don't recall the name of it.

Q. Did he tell you he was a plumber.

A. Yes.

Q. Working on soda dispensing machines?

A. As I recall, it had something to do with soda fountains.

Q. He told you he was married?

A. Yes.

Q. You had seen his wife at his home?

A. That's right.

Q. And his children?

A. That's right.

Q. Now, he also told you he had nothing to do with any narcotic transactions, didn't he?

A. No, sir, he didn't.

Mr. Emanuelson: I object to that.

By Mr. Walsh:

Q. Did he ever deny it at any time that he was in your custody?

A. No, sir.

Q. Did you ask him to sign anything?

[fol. 80] A. No, sir.

Q. During that whole period?

A. No, sir.

Q. Did anyone else in your presence ask him to sign anything during that period?

A. No, sir.

Q. And you ceased all conversation with him a few minutes after you arrived at 11th and State, is that correct?

A. Oh, I couldn't say exactly how long afterwards it was. It was probably 30 to 45 minutes.

Q. Was there any conversation in the presence of this man Doe, between you and the Agents and Police Officers and Roviaro?

A. Yes, sir.

Q. As a matter of fact, Doe said he did not have a transaction with him, didn't he, in Roviaro's presence?

A. Do you want the entire conversation?

Q. Isn't what I asked you a fact?

A. No, sir. He didn't deny it.

Q. Didn't Doe say he didn't even know him?

A. Yes, sir; at first he did.

Q. And this was the man who was an informer, set up by you for this transaction?

[fol. 81] A. That's right.

Mr. Walsh: That is all.

Redirect Examination.

By Mr. Emanuelson:

Q. Now, the first time you saw the Defendant Roviaro was some time in June. Who was with him at that time?

Mr. Walsh: I object to this.

Mr. Emanuelson: You brought it out. You opened it up. He just asked him, your Honor, about John Doe saying that he did not know Roviaro.

He brought it out, and opened it up of his own free will.

Mr. Walsh: I merely asked for conversation, Judge.

Mr. Emanuelson: You made that statement. You said that he said that he didn't know him. You have opened it up and we can go all the way, once you have started it. We can certainly go the rest of the way.

Mr. Walsh: That is not what I asked. I opened up the conversation, that's all. That is as far as I opened it up. That is all I opened up.

The Court: He may answer.

Mr. Walsh: Your Honor, the point is this. All I asked is the conversation. On a prior date I asked him

if he had seen Roviaro at his place, prior to that, at [fol. 82] his home prior to that, but as far as this conversation is concerned, I do not admit that that opens that situation up.

Mr. Emanuelson: Let's have the Reporter read the last couple of questions you asked him. You asked him if John Doe said that he did not know Roviaro.

Mr. Walsh: That is right.

Mr. Emanuelson: And he denied it.

Mr. Walsh: That is right.

Mr. Emanuelson: Now, I propose to show that they were together on June 22nd.

The Court: You may proceed.

By Mr. Emanuelson:

Q. On June 22nd, 1954, you said you saw Albert Roviaro for the first time; is that right, sir?

A. Yes; that is right.

Q. Who did you see him in the company of?

A. Roviaro?

Q. Yes.

A. In the company of John Doe.

Q. The John Doe you have been referring to since you took the stand this morning?

A. That's right.

Q. Is that correct?

[fol. 83] A. That's right.

Q. And the second time you saw Albert Roviaro, who was he in the company of?

A. He was in the company of John Doe. He went into the residence that day.

Q. I see. Is he the same John Doe you have testified about——

A. The same John Doe.

Q. —throughout this trial?

A. That's right.

Mr. Emanuelson: Your Honor, there are some more things I would like to put in, but it is now 12:40 and it is going to take some time.

There are several things defense counsel has opened

up here, but they will take about twenty-five minutes. Does your Honor want me to continue?

The Court: We will now declare a recess and return back here promptly at two o'clock, gentlemen.

(Whereupon the trial of the above-entitled cause was recessed until 2:00 o'clock p.m. of the same day.)

[fol. 84] COURT MET PURSUANT TO RECESS

COLLOQUY BETWEEN COURT AND COUNSEL

The Clerk: The case on trial.

Mr. Walsh: May it please the Court, I move to strike these last questions and answers which were secured in the interrogation of Mr. Emanuelson, first, because my cross examination was not completed, he just took over on his objection and went forward; and second; I respectfully submit that while my question, which was directed to conversation and a statement by this John Doe, may open up that entire conversation, it still does not open up all the transactions that John Doe had.

It only opens up the conversation, and only that.

[fol. 85] Mr. Emanuelson: You asked the witness—you made a statement, I think, on cross examination, that John Doe said he did not know Roviaro.

Mr. Walsh: I asked——

Mr. Emanuelson: No. First you did not ask him. You made the statement, didn't you?

Mr. Walsh: Well, counsel, I can only ask questions.

Mr. Emanuelson: All right.

Mr. Walk: I said, "As a matter of fact, didn't he say that?"——

Mr. Emanuelson: All right.

Mr. Walsh: —and the witness answered "Yes."

Mr. Emanuelson: So the issue you were trying to prove was the fact that John Doe did not know Roviaro. That was what you were trying to prove by your question.

Mr. Walsh: No, not at all. I am trying to prove John Doe said he didn't know him. That is as far as it goes.

The Court: Well, as a matter of fact, gentlemen, I am

going to strike all the testimony involving the second conversation. The first one, in the car, may stand.

Mr. Walsh: Well, your Honor——

The Court: I did not rule on the second conversation. I withheld my ruling, I believe.

[fol. 86] Mr. Walsh: Well, your Honor, as it stood on direct, as to all of these conversations it was my contention that they were strictly hearsay. That was the part that I was complaining about, and as far as the conversation in the automobile is concerned with the Defendant, I do contend it was not in the nature of a confession and that it did not tend to prove the issue.

The Court: The conversation in the automobile will stand.

Mr. Emanuelson: As to the other conversation you were talking about, you asked him what conversation he had at Police Headquarters at 11th and State, where they were all present——

The Court: I withheld my ruling on that.

Mr. Walsh: I have no objection on that.

The Court: I am now striking that.

Mr. Walsh: On your Honor's motion?

The Court: Well, you move to strike it, and I withheld my ruling on it.

Mr. Walsh: I am attempting to cross examine on it now.

The Court: Well, if it is stricken there is nothing to cross examine on.

Mr. Walsh: All right.

Mr. Emanuelson: You had finished with him and I [fol. 87] started again.

Mr. Walsh: No, sir. I have not turned him over or concluded my cross examination at all. I do not think the record will show that I concluded my cross at all.

Mr. Emanuelson: Well, Mr. Walsh——

Mr. Walsh: You just took off and started asking questions right in the middle of my cross examination, because we had had some conversation——

Mr. Emanuelson: As I heard you, you said, "That is all" and you sat down. I don't know why you didn't object at the time.

We can withdraw all the questions and answers he

gave since then, if in fact you had not completed your cross examination, but I do not think that is a fact, because I had nothing to gain by going ahead with redirect examination before your cross examination was completed.

The Court: So that the record may be clear, all the conversation that took place at Police Headquarters is stricken by the Court, and consequently the cross examination on that point is also strieken.

Now, there appears to be some confusion as to whether or not counsel has turned the witness over for redirect examination, but——

[fol. 88] Mr. Emanuelson: Your Honor, certainly if counsel is going to object—he did not raise any objection at the time, and I even stopped and asked your Honor what time you were going to continue to, and he said nothing about it then.

I have heard no objection made when I was asking him questions on redirect examination, that counsel had not finished his cross.

Mr. Walsh: We had the discussion——

The Court: Let's proceed, gentlemen. Is there any further cross examination?

Mr. Walsh: Yes, there is.

The Court: All right. Proceed.

Norris M. Durham, called as a witness by the Government herein, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Cont'd.)

By Mr. Walsh:

Q. You say you spent twenty minutes at the home of the Defendant at 10549—is that the right number?

A. 10459.

Q. 10459?

A. That's right.

[fol. 89] Q. (Continuing)—on the night of August 12th, 1954?

A. Twenty to thirty minutes.

Q. Twenty to thirty minutes?
A. Yes, sir.
Q. Were all of the men whom you mentioned with you? Was John Doe in the place?
A. Not inside, no, sir.
Q. John Doe remained outside?
A. Yes, sir.
Q. With whom?
A. Agent Fields.
Q. So you and Sims and Bryson were inside?
A. Yes, sir.
Q. Anyone else?
A. Yes, sir.
Q. Who?
A. Agent Carroll Hamback of the ATU.
Q. Agent Carroll Hamback?
A. Carroll Hamback, yes, sir.
Q. He had not come there with you?
A. He came in an ATU car.
Q. Separately?
A. Yes, sir.
Q. Was he there when you arrived, or did he come later?
A. No. He came up shortly after we arrived and entered [fol. 90] the house with us, and after we placed the Defendant under arrest Agent Hamback left.
Q. Did he take part in the search of the house?
A. No, sir.
Q. Now, you went to the attic, did you?
A. I went to the second floor.
Q. What is on the second floor?
A. Bedrooms; a bath and bedrooms.
Q. All right.
A. It's a two-story house.
Q. What did you do up there?
A. I went up there and I looked in the various rooms and I stayed with the Defendant while he got dressed.
Q. What did you look at in the rooms?
A. Just opened the doors and looked in the rooms, that's all.
Q. Did you make any search for narcotics?
A. No, sir.

Q. You didn't?
A. No, sir.
Q. Did you make any search for money?
A. No, sir.
Q. Did you count his money?
A. His personal money?
[fol. 91] Q. Yes.
A. Yes, sir, we did.
Q. Was his money—did you count it or was it done in your presence?
A. I don't recall. I vaguely recall having handled his money. I am not sure on that.
Q. Had there been any money given to John Doe when he got out——
A. No, sir.
Q. —and left you in the Cadillac?
A. No, sir. There had not.
Q. Now, with reference to your conversations with the Defendant which took place on the way to the Police Station at 11th and State, did they cease when you arrived there, or did you continue to talk to him throughout his custody?
A. There were words passed back and forth. I don't recall all of them in their entirety.
Q. Did you make any notes of that conversation?
A. No, sir.
Q. Did you make any note or written report concerning your findings of the package which the proof would indicate was narcotics?
A. Not immediately.
[fol. 92] Q. Well, when did you?
A. The report was made, as I recall, one or two days later.
Q. You did not make any report to Agent Fields about that in writing?
A. No, sir.
Q. But he did? He made the notation on this envelope?
A. That's all he made, what is on the envelope; that is right.
Q. Did you make any statement to him as to how this package was acquired?

A. By myself?

Q. By anyone.

A. Yes, sir. Some time after the arrest there was a discussion as to the events leading up to the finding of the package and the taking of the Defendant.

Q. That was a discussion between whom?

A. Agent Fields and myself at one time, and as I recall, another time there was a discussion between Agent Fields, myself and Officers Bryson and Sims.

Q. How soon after the arrest did that take place?

A. Oh, I wouldn't know.

Q. The same night?

A. I see those men frequently.

[fol. 93] Q. The same night?

A. There was possibly some discussion that day with Agent Fields. I don't recall having seen Bryson or Sims any more that day.

Q. Any more what day, now?

A. The 13th.

Q. The 13th?

A. Yes, sir.

Q. But you were all together when this envelope was made out?

A. No, sir, we weren't.

Q. Who was there?

A. Fields and myself.

Q. Fields and you?

A. That's right.

Q. Where were the Police Officers?

A. I don't know.

Q. Was this done at 11th and State?

A. No, sir. It was done at the Office of the Bureau of Narcotics.

Q. I see. On what date?

A. On the 13th of August, 1954.

Q. Was that while you were previously on duty from the evening before, or after you returned?

[fol. 94] A. There was a break.

Q. Sir?

A. There was a break.

Q. Was it after you returned from home?

A. Yes, sir.

Q. Well, this date of August 12th, 1954, refers to the time that——

A. The package was found.

Q. The time that the package was found?

A. Yes, sir.

Mr. Walsh: Now, your Honor, before I conclude on this question of the identity of the informer, I would like to read very briefly from United States vs. Conforti, in which that question arose.

Mr. Emanuelson: First, before defense counsel reads this, your Honor, I would like to know if he is now making a motion in addition to the one he originally made and that your Honor ruled on, at which time we filed briefs?

Mr. Walsh: No. I am asking for cross examination that I consider proper, your Honor. It is not a motion.

The other was a motion for a Bill of Particulars.

Mr. Emanuelson: You asked for the name of the informant at that time.

[fol. 95] Mr. Walsh: Yes.

Mr. Emanuelson: That is right. You filed a motion and a brief with it.

Mr. Walsh: But this is a different matter. This is a matter of cross examination, now. May I proceed, your Honor?

The Court: Proceed.

Mr. Walsh: This is at page 367 of 200 F. 2d, entitled United States vs. Conforti. It is a case from our Circuit Court of Appeals, an opinion by Judge Swaim.

(Mr. Walsh thereupon read from the opinion in the above-cited case.)

Mr. Walsh: I have asked for the identity on cross examination, and I respectfully submit we should have that information.

Mr. Emanuelson: Now, your Honor, we have an entirely different situation here. He talks about No. 54. Notwithstanding that counsel for the Defendant went into these things and opened up the fact that John Doe said he did not know Roviaro, and thereafter the witness told of the

different times when John Doe was with Roviaro on different occasions.

If Roviaro knows what he has done in the past, then he knows who John Doe is and he can tell his lawyer and the Government does not have to reveal it.

[fol. 96] This is not a case of putting up a number and not telling where he was before or what he had done before. We have put him at similar places and similar occurrences, and he can identify who it was from that.

Mr. Walsh: No. There is no indication of a prior situation with similar occurrences in any respect, but there is some evidence which as I understand it now, has been stricken, that this person once met the Defendant at or about his home.

Your Honor, the very fact that the Government will not identify this person indicates to me that we are in the dark. I do not think we have been accurately informed of the offense against us, and I think it goes just that far.

Mr. Emanuelson: You have had the complete testimony of an eye-witness. There is nothing more that could be told except by the individual police officer whom he said was in the trunk.

Those are the two eye-witnesses. There is nothing more anybody can tell. The fact is that John Doe, if he were here, could not tell the exact location of the car, which we will go into with future witnesses.

Mr. Walsh: John Doe was in the automobile with the [fol. 97] Defendant——

Mr. Emanuelson: That is right.

Mr. Walsh: According to this witness' testimony.

Mr. Emanuelson: And where did the Defendant pick up the package from the tree and where was the car with relation to that? You have not heard the testimony from the Police Officer in the trunk yet, but I do not think——

The Court: Well, the objection is sustained. Proceed.

Mr. Walsh: I could enlarge my cross examination in that direction, your Honor, but I assume the objection would be sustained——

The Court: That is right.

Mr. Walsh: (Continuing)—if I proceeded to do that, and were to say his name or anything else?

The Court: That is right.

By Mr. Walsh:

Q. Now, you described following the Defendant's—it was not the Defendant's automobile. This was John D 's automobile, is that right?

A. That's right.

Q. Was the car owned by John Doe, to your knowledge?

A. It wasn't registered to him.

[fol. 98] Q. Was it a Government car?

A. No, sir.

Q. Was it——

A. I don't know to whom the car was registered, or if the person actually existed. The car was his.

Q. You saw him use it frequently, is that right?

A. All the time.

Q. You followed it south on Cottage Grove to 74th, is that right?

A. No, sir. South on Cottage Grove to 72nd.

Q. To 72nd?

A. That's right.

Q. Then where?

A. The car turned west on 72nd and stopped momentarily on 72nd just west of Evans, and then pulled off again and proceeded west to Champlain and south on Champlain to 74th, and then west on 74th.

Q. Is Champ*a*lin the second street west of Cottage Grove?

A. No, sir. You have Evans, Langley, and then Champlain.

Q. Between Champlain and St. Lawrence the car stopped again?

A. Yes, sir.

[fol. 99] Q. Is that my understanding of your direct?

A. Yes, sir.

Q. And you stopped behind it?

A. That's right.

Q. How far is Champlain from St. Lawrence?

A. One block.

Q. What is the distance in feet, in your judgment?

A. Approximately 200. It is a short block. 200 or thereabouts.

Q. Is there an alley between the streets?

A. Yes, sir.
Q. Were you east of the alley?
A. That's right.
Q. Where was the automobile of John Doe?
A. Just west of the alley.
Q. How many feet separated you two?
A. 96 feet.
Q. 96?
A. That's right.
Q. Could it have been 94?
A. No, sir.
Q. Why not?
A. I measured it.
Q. Wel', then and there?
[fol. 100] A. No, sir.
Q. When?
A. On the 7th of this month, this year.
Q. The 7th of this month?
A. Yes, sir.
Q. Well, now, how did you do that?
A. With a 100-foot steel tape measure.
Q. Did you then estimate where his car was and where yours was?
A. I didn't measure it to where his car was. I measured it to where the tree was, to where the package was picked up by the Defendant.
Q. From where the tree was?
A. From where I stood to the tree from which the Defendant picked up the package.
Q. You were out of your car at that point?
A. Yes, sir.
Q. Where were you at that point?
A. Just west of Champlain on 74th Street there's a huge tree, the umbrella type, except it is much larger, and the foilage is possibly seven to eight feet above the pavement, starts seven or eight feet above the pavement and goes up. I was under that tree.
Q. Does that tree cast a shadow?
[fol. 101] A. Yes, sir.
Q. How big around is that tree, would you say?
A. Oh, the tree is possibly——
Q. Not the trunk, now; the foliage.

A. No, no, the foliage is possibly ten to twelve feet in diameter.

Q. Ten to twelve feet?

A. With full foliage.

Q. Well, that is not a huge tree, is it?

A. No. I didn't say that it was a huge tree. I said huge for an umbrella type.

Q. I see. How tall was it?

A. That tree is possibly 18 to 20 feet tall.

Q. Did you stand in its shadow?

A. Yes.

Q. How far west of the west curb line of Champlain is that tree?

A. That tree is possibly 50 feet from the west curb line of Champlain.

Q. Then there was about 50 feet left to the alley, is that right?

A. No, sir.

Q. How much more?

A. The tree by which the Defendant picked up the [fol. 102] package——

Q. I thought you stood by the tree.

A. No, no. There was two trees, the one I stood by, and the one the Defendant——

Q. You were under one——

A. That's right.

Q. (Continuing)—and the Defendant was under one, is that right?

A. That's right, yes, sir.

Q. Is the one you were last talking about—is that the umbrella type?

A. Yes.

Q. Is that the one you were under?

A. Yes, sir.

Q. That is 50 feet west of Champlain?

A. Approximately, from the west curb of Champlain.

Q. All right. Now, where is the second tree about which you were talking?

A. It's 96 feet west of that first tree going towards St. Lawrence, and just beyond the alley.

Q. What type of tree is that?

A. It's a tree similar to the one I just described. I don't know the species.

Q. Was it big?

[fol. 103] A. Approximately, yes.

Q. Did the foliage begin just as low on that one as it did on the one you were under? Let's call it your tree.

A. On one side, yes, sir; not on the other side.

Q. Well——

A. The side nearest to me—you see, there's a lamp-post there, a light-post, an electric light, and that light is about ten to twelve feet above the sidewalk—it is one of those open bulb type with a white reflector above it reflecting the light down—and the tree has apparently been trimmed on that side so the branches, limbs and leaves don't lay against the live wires.

Q. How far is that tree from the alley?

A. The tree itself?

Q. Yes. Is it west——

A. Approximately twelve to fourteen feet from the alley, west of the alley.

Q. From the alley?

A. That's right.

Q. And the light post is where?

A. Six and a half feet from the tree.

Q. East of it or west?

A. East of the tree; from the trunk, that is.

Q. It is not right at the corner of the alley——

[fol. 104] A. Approximately, yes, sir.

Q. —the light post, isn't that right?

A. Approximately, yes—not on the corner. It's just off the corner, approximately five to six feet off the corner. You have the light post, and six and a half feet from that begins the trunk of the tree.

Q. How big is the trunk of the second tree?

A. Possibly twelve to fourteen inches. It wouldn't be over that.

Q. Was there any other tree between these two that are 96 feet apart?

A. Not as I recall.

Q. Any shrubbery?

A. No, sir, nothing. Just a parkway with grass.

Q. No border shrubbery at all around this parkway?
A. You mean a hedge?
Q. Yes, sir.
A. No, sir.
Q. No fences?
A. No, sir.
Q. You are sure of that?
A. That's right.
Q. Now, how far was the automobile of John Doe from this second tree?
[fol. 105] A. The rear bumper of John Doe's automobile was just a few feet beyond—not being right up to the automobile at that time I couldn't tell, but when I walked up to the automobile I saw him stop momentarily and pick up the package and proceeded on west to St. Lawrence, and I would say roughly that the rear bumper of the automobile was three or four feet——
Q. Just a minute, just a minute. You say the automobile proceeded on west?
A. No, no, no. The automobile stayed there. I proceeded west on foot.
Q. Well, you were watching all the time, of course?
A. Yes, sir.
Q. And the Cadillac was faced west, was it not?
A. That's right.
Q. And you were walking toward it?
A. Yes, sir.
Q. Well, it was, you say, six or ten feet west of the tree?
A. No, sir. I didn't say that.
Q. Well, how much?
A. The Cadillac you are speaking about?
Q. Yes.
A. Three to four feet.
[fol. 106] Q. Three to four feet?
A. Yes, sir.
Q. Was the door open?
A. Yes, sir.
Q. At the time when it stopped the door immediately opened, is that true?
A. Yes, sir, it did.

Q. There was no hesitation about that?
A. No, sir.
Q. You say you saw the Defendant emerge then?
A. That's right.
Q. Now, at that point could you distinguish his face?
A. Yes, sir.
Q. You could from a distance of 100 feet at that point?
A. Yes, sir.
Q. The light was between you and him?
A. The light was very close to the Defendant.
Q. The light was between you two, though?
A. Yes, there was.
Q. Then he turned and walked towards you, is that right?
A. Not exactly towards me. He walked diagonally northeast from the car.
Q. Well, at least in part walked—at least in part he was walking east?
[fol. 107] A. Yes, that's right.
Q. What did you see him do?
A. He stooped down beside the tree on the side, partially facing the post, the light post.
He stooped down on that side and picked up a package. He stopped down and picked it up this way (indicating).
Q. Then the package was on that side of the tree which would be well lit by the light?
A. Yes, that's right.
Q. Sitting out in the light?
A. That's right.
Q. He picked it up and walked over to the automobile?
A. Yes, sir.
Q. Did he return immediately?
A. Did he return immediately?
Q. To the automobile.
A. After picking up the package?
Q. Yes.
A. That's right.
Q. What did you do?
A. I stood there for a moment until he put the package into the car and then he immediately walked away.
Q. Did you see him put the package——

[fol. 108] A. Yes, sir.

Q. —in the car?

A. Yes, sir.

Q. Did you see him make a motion as though to put the package in the car?

A. I saw him put the package in the car.

Q. Did you see the package also?

A. He stuck his hand in the car with the package and when he pulled his hand out, his hand was empty.

Q. Did he hold it out so you could see it?

A. He didn't dangle the package this way (indicating), no, sir. It was a normal movement.

Q. Which hand did he use?

A. His right hand.

Q. Then he was facing south?

A. Yes, sir.

Q. So his body was between you and his arm, his right hand, wasn't it?

A. Not necessarily.

Q. Didn't he face the car?

A. Not necessarily.

Q. Did he face the car, I am asking you as a matter of fact, not necessarily.

A. Yes, he did; that's right.

[fol. 109] Q. So his arm was on the side away from you, isn't that true?

A. Yes, sir.

Q. And he reached in——

A. That's right.

Q. —with his hand?

A. That's right.

Q. And came back?

A. Yes.

Q. You couldn't see that package at that time, could you?

A. At which time?

Q. At the time his hand went in the car.

A. When his hand went in the car, yes, sir.

Q. Could you identify the color?

A. Of the package?

Q. Yes.

A. No, I couldn't. I could tell it was a dark package.

Q. Or the size?

A. Not exactly, no, sir.

Q. Or the shape?

A. No, sir.

Q. But you do know that when his hand came out it was empty?

[fol. 110] A. That's right.

Q. That is not a conclusion on your part? You actually saw that?

A. I actually saw that, yes.

Q. And this is at 100 feet? You were 100 feet away?

A. I was 94 feet from the tree.

Q. Well, he is well beyond the tree now, isn't he?

A. He may have been 101 or 102 feet. I couldn't say exactly how far beyond he was.

Q. Well, there is not much difference between 100 feet——

A. No, sir.

Q. ——and 101.

A. No, sir.

Q. How far did he have to walk to that tree from the seat of the car?

A. Seven or eight feet.

Q. When he started back with the package did you start towards him, too?

A. No, sir.

Q. You waited?

A. I waited to see what his next move was going to be.

Q. And what did he do?

A. As soon as he put the package on the seat he backed [fol. 111] away from the car.

Q. He backed away?

A. Backed away just a few feet to clear the door, and he made a motion with his hand to John Doe.

Q. Show us the motion.

A. Like that, that's all (indicating).

Q. "Farewell", or——

A. Oh, just waved his hand that way (indicating), and walked away.

Q. And what did you understand that motion to be?

A. That would be a conclusion, sir.

Q. Well, I have asked for it.
A. "I'll see you later", or "So long."
Q. And then he walked which way?
A. He walked west on 74th Street.
Q. Did the automobile remain there?
A. Yes, sir.
Q. How far did the Defendant walk?
A. The Defendant then walked on the north side of 74th to St. Lawrence, and when he got to the northeast corner he cut diagonally across to the southwest corner, across the intersection, and continued walking south on St. Lawrence towards a point about two-thirds of the way between 74th and 75th.
[fol. 112] He then entered the Pontiac on the driver's side and took off.
Q. He walked all this time?
A. Yes, sir.
Q. How far were you behind him?
A. I remained—I walked diagonally across the same way the Defendant had walked. I walked over to the southwest corner and I remained at that corner until the Defendant got in his automobile.
Q. Just watched him?
A. That's right.
Q. You were not in pursuit?
A. Not at that point, no, sir.
Q. The Cadillac, however, is parked here now with the door open, isn't that right? As the Defendant walks away the right front door is open?
A. As he walked away, yes, sir.
Q. He didn't close it?
A. No, sir.
Q. And the car just stayed there?
A. Stayed there, that's right.
Q. But you did approach it?
A. The Cadillac?
Q. Yes.
[fol. 113] A. Yes, sir.
Q. And you looked in?
A. I took the package off the floor of the car.
Q. Well, I thought you said you saw it on the seat.

A. I didn't say I saw it on the seat. I said the Defendant placed it in the car at approximately seat level.

When I got to the car the package was lying on the floor right in front of the seat.

Q. And you just took the package——

A. That's right.

Q. —and walked away?

A. No. I knocked on the side of the car first and called to Officer——

Q. Which side of the car?

A. On the passenger side, and I called to Officer Bryson to come out.

Q. Did he come out immediately at that point?

A. Yes, sir.

Q. And confer with you?

A. No, sir.

Q. Well, was he out before you left the car then?

A. No, sir.

Q. How long did it take him to get out?

[fol. 114] A. I don't know, but he was inside of the car when I got back.

Q. He was seated in the passenger compartment?

A. That's right.

Q. When you got back?

A. That's right.

Q. How long were you away from the car, now, at this point?

A. Two to three minutes.

Q. You are positive, now, that this package was not found by Officer Bryson when he got out of the car, that it was not found on the curbstone or the parkway next to the car?

A. No, sir.

Q. But you are the one that found it?

A. That is correct.

Q. And this report by Agent Fields is incorrect then?

A. Not the entire report. That portion right there (indicating).

Q. The portion that says, "Found by Officer James Bryson", is that right?

A. That's right, yes.

Q. Now, you made the report of this——

A. That is not a report, counsel. That is merely [fol. 115] written on the face of that envelope to identify the contents.

Q. Well, it is an official document, isn't it?

A. That is not accepted as a report.

Q. Well, it has remained in the custody of the Government ever since it was made?

A. Yes, sir; that is right.

Q. And you say it was made by Agent Fields?

A. That is correct.

Q. At or about the time of this occurrence?

A. The same date.

Q. Yes. Later on the same date, and the date is August 12th, 1954?

A. The date of——

Q. At 11:15?

A. The date that the package was recovered.

Q. Well, what is the date this was made, then? Does that show?

A. August 13th, 1954.

Q. I see. Thank you. This document, Government Exhibit 6, shows that you are the Agent reporting the case, doesn't it?

A. The case, yes, sir. Not the evidence; the case.

Q. And you examined this after—well, that was an- [fol. 116] swered.

May I have those envelopes, the glassine envelopes?

Mr. Emanuelson: Yes.

(Mr. Emanuelson handed Mr. Walsh envelopes.)

By Mr. Walsh:

Q. Government Exhibits 2, 3, 4 and 5, you have told us on direct, made up the package together with the substance that was in glassine envelopes?

A. Yes, sir.

Q. That you recovered from the Cadillac?

A. That is right.

Q. And that is the subject of Government Exhibit 6?

A. Yes, sir.

Q. What is the difference between the condition of these envelopes now and at the time you first saw them at 69th and Cottage Grove?

A. Lack of contents and the discoloration there.
Q. Do you know what the discoloration comes from?
A. Yes, sir.
Q. What?
A. These envelopes were processed for fingerprints.
Q. And was that at your request?
A. Yes, sir.
[fol. 117] Q. Who processed them?
A. Mr. William J. Sheehan.
Q. Was Government Exhibit 2 processed?
A. I don't know, sir.
Q. This Government Exhibit 2——
A. This is about the same color as it was at the time it was found by me, and I could not tell you if it has been processed or not. However, there appears to be some slight discoloration in patches.
Q. And burns?
A. Yes.
Q. From the substance?
A. Yes, so this package may have been processed and it may not have; that is, this wrapper.
Q. Do you know whose fingerprints were found on the Exhibits?
A. No one's.
Q. None at all?
A. None at all.
Q. Where was Roviaro's Pontiac? You say he went to his Pontiac. Where was that when he re-entered it?
A. After leaving John Doe? On St. Lawrence, on the west side, headed south about one-third of the way north of 75th Street.
[fol. 118] Q. Well, did you follow him in that car after that?
A. No, sir.
Q. Did anyone else to your knowledge?
A. No, sir.
Q. What time was it when you last saw him there walking away from the Cadillac?
A. Approximately 11:15 to 11:20.
Q. And you arrived at his home to arrest him about what time?
A. About 12:30.

Mr. Walsh: That is all.
Mr. Emanuelson: Are you through now?
Mr. Walsh: Yes, sir.
Mr. Emanuelson: all right.

Redirect Examination

By Mr. Emanuelson:

Q. At the time that you found Government Exhibits 2, 3, 4 and 5, what did you do with them? I mean, after finding them.

A. Immediately after finding them?

Q. Yes.

A. I kept these in my possession.

Q. Did you open that package?

A. Not immediately.

[fol. 119] Q. How soon?

A. Approximately ten to twelve minutes afterwards.

Q. Did you handle those glassine envelopes?

A. No, sir. I took this package and wrapped my handkerchief around it and kept it that way.

Q. I see.

A. When I gave it to Officer Bryson I requested Officer Bryson to keep this enclosed in his handkerchief or a similar piece of cloth, and that was the way it was handled until it was delivered to Mr. Sheehan for processing.

Q. At the time you saw Roviaro pick up this package from behind the tree on 70th Street, or 74th Street there at St. Lawrence, near the curb and the alley, where was Detective Bryson?

A. He was then in the trunk of the automobile of John Doe.

Q. Do you know if he observed this?

A. I only know what I was told. I could not see too much of the trunk of the automobile right at that moment, that is, the condition of the trunk of the automobile.

Q. Did you know whether or not he was in the trunk?

A. Yes, Sir.

Q. He was in the trunk?

[fol. 120] A. Yes, sir.

Mr. Emanuelson: All right. Your Honor, I suppose there is going to be a lot of argument about this.

Mr. Walsh asked the witness numerous questions about his size and height and how he tried to examine the trunk of the Cadillac. I propose to show to your Honor—we have some photographs which I would like to have marked, and I would like to have Agent Durham tell us how the photographs were taken and the particulars about it.

In addition, I propose to show that Agent Durham and myself and an employee of the Cadillac Motor Car Company conducted an experiment last June 7th wherein Agent Durham did get into the trunk and it was closed tightly.

Now, I am proposing this and submitting this because he brought out the questions and by his questions he opened up the subject. He asked him all these things about how he got in the trunk and his size, and so forth, so I would like to show to your Honor that such is possible, but I imagine Mr. Walsh is going to object.

Mr. Walsh: Well, why don't you go ahead? I don't know what counsel is suggesting that I should do now.

I do not want to prolong this, but I do not know what [fol. 121] he wants. I don't want to give anything away, either.

Mr. Emanuelson: Will you mark this as Government's Exhibit 11 for identification, please.

(Whereupon the photograph was marked Government Exhibit 11 for identification.)

Mr. Emanuelson: Will you mark this 12, please.

(Whereupon the photograph was marked Government Exhibit 12 for identification.)

Mr. Emanuelson: And 13.

(Whereupon the photograph was marked Government Exhibit 13 for identification.)

Mr. Walsh: Incidentally, this is not proper rebuttal. If it is a matter of redirect I will not object to his recalling the witness, but I object if it is offered as rebuttal.

Mr. Emanuelson: It is not rebuttal. It is redirect.

You examined him as to the dimensions and what was in

the trunk of the Cadillac, and how many levels it had, and so forth. You recall that.

Mr. Walsh: Suppose you ask your questions, and if I [fol. 122] have any objections I will make them.

Mr. Emanuelson: All right.

By Mr. Emanuelson:

Q. I show you Government Exhibit 13 for identification and ask you if you have ever seen that before?

A. Yes, sir.

Q. When did you see this?

A. I took this photo——

Q. When?

A. On June 7th, 1955.

Q. This year?

A. Yes, sir.

Q. Where?

A. At the South Shore Cadillac Company, in the parking lot.

Q. What does that purport to be?

A. This is a photograph of Officer Bryson lying in the trunk of an identical automobile to that owned and operated by John Doe.

Q. Being what kind of an automobile?

A. A Cadillac 62, 1954, four-door sedan.

Mr. Emanuelson: I offer it in evidence.

Mr. Walsh: I object to it. He testified the man was in the trunk. I assume Bryson will say he was in the trunk. [fol. 123] This photograph will not help us prove that he was in the trunk.

Mr. Emanuelson: He took the picture, and he saw the man in the trunk. By your questions you inferred that even a man of his size couldn't get into the trunk.

Mr. Walsh: Counsel, I think, feared the effect of my questions too much. I asked a question. When I ask a question——

The Court: Objection sustained.

Mr. Walsh: —I am not testifying under oath.

Mr. Emanuelson: Well, I just want to be sure he is satisfied after that cross examination.

The Court: The objection is sustained. Proceed.

By Mr. Emanuelson:

Q. I show you Government Exhibit 12 for identification and ask you if you have ever seen that before?

A. Yes. This is a photograph taken by Officer Bryson at the same time, from a slightly different angle; the same automobile?

Q. The same automobile?

A. Yes, sir.

Q. At the same date you last referred to?

A. The same date, the same location.

[fol. 124] Q. I show you Government Exhibit 11 for identification and ask you if you ever saw that before?

A. Yes, sir. This is also a photograph taken the same date at the same location with the same automobile, showing Officer Bryson with the trunk lid lowered almost in a closed position.

Q. You took this photograph also?

A. Yes, I did.

Q. What kind of a camera did you use to take these three photographs?

A. A Rolacord, and each of these photographs was taken at f8, using a——

Mr. Walsh: If he says that truly and correctly portrays what he saw I will not argue about the substance, but I will argue about the materiality of it.

Mr. Emanuelson: It must have been very material, because—I am not trying to be facetious, but I respectfully submit to the Court that defense counsel made rather a point on cross examination of the witness as to the examination made by the witness of the Cadillac trunk——

Mr. Walsh: Well, I do——

Mr. Emanuelson: (Continuing)—the dimensions, the level of the floor, and so forth. This witness is the [fol. 125] one who took the photographs, and he took them of Bryson, who is a much larger man, so if there is any inference—

Mr. Walsh: That does not appear of record yet, other than his statement that he is an inch taller and ten pounds heavier.

The Court: Are you objecting to the use of these photographs?

Mr. Walsh: Yes.
The Court: Objection sustained. Proceed.

By Mr. Emanuelson:

Q. On the night of August 12th, 1954, when you testified you saw the Defendant, Albert Roviaro, pick up this package from the tree, what were the conditions of the light and the weather?

A. Roviaro picked up the package from under the tree approximately six feet away from a light post. The light was burning. The night was clear. The moon was one and a half days from being a full moon.

Mr. Walsh: I assume that is from a weather report, is that right?

Mr. Emanuelson: It is. I think we can save some time if the Court will take judicial notice—do you want to see this?

(Mr. Emanuelson handed Mr. Walsh a document.)

[fol. 126] Mr. Emanuelson: I am going to offer it in evidence.

Mr. Walsh: Well, this will be admissible regardless of the witness' testimony, I assume, if it is the United States Weather Department's Official Report. I will wait until we have a recess so that I can examine it, Judge.

The Court: All right.

Mr. Emanuelson: Well, in line with his testimony, your Honor, I ask the Court to take judicial notice of—would you mark these three Exhibits, please, Mr. Reporter.

Mr. Walsh: I do not think it is a matter of judicial notice. He is going to introduce a weather report.

Mr. Emanuelson: During a recess you can examine them.

Mr. Walsh: I will examine them during a recess. I have no quarrel with the weather report if it is from the Weather Bureau. If this is what the Weather Bureau says happened, we will assume they would so testify if they were called.

Mr. Emanuelson: That is right.

Will you mark these as Government Exhibits 14, 15 and 16 for identification, please, Mr. Reporter.

(The documents were thereupon marked Government's Exhibits 14, 15 and 16, for identification.)

[fol. 127] Mr. Emanuelson: Do you want to admit these now?

The Court: He said he wanted to examine them.

Mr. Walsh: I have no objection if they are the proper dates. I assume that covers the dates.

Mr. Emanuelson: Yes.

Mr. Walsh: No objection.

Mr. Emanuelson: May they be received in evidence?

The Court: Yes.

(The documents previously marked Government's Exhibits 14, 15 and 16 for identification were thereupon received in evidence as Government's Exhibits 14, 15 and 16, respectively.)

The Court: Proceed.

By Mr. Emanuelson:

Q. On June 7th, 1955, at 5:00 o'clock p.m., were you employed by the United States Treasury Department in your present capacity?

A. Yes, I was.

Q. Can you tell the Court what took place at that time and date?

Mr. Walsh: I object to this, your Honor, as not proper redirect examination; it is not within the scope of the [fol. 128] cross examination.

Mr. Emanuelson: It certainly is in the scope of the cross examination. This is the thing I have been talking about, your Honor.

We are back to the Cadillac and the trunk and the contents and the material that is in the trunk.

He asked him in great detail how the back seat was constructed, what was between the trunk and the back seat, what was the size of and how the trunk operated, how he got in and how he got out.

The Court: Proceed.

Mr. Emanuelson: He may raise an objection, if it is objectionable.

The Court: Proceed.

By Mr. Emanuelson:

Q. Continue.

A. Yes, sir. On the 7th of June, 1955, Mr. Bryson and myself went to the vicinity of 70th and St. Lawrence. From there we went to 72nd Street, west of Cottage Grove, and from there to 74th Street between St. Lawrence and Champlain.

From there we went to the South Shore Cadillac Company, located on East 71st Street, and conducted an experiment with a Model 62, 1954 Cadillac.

[fol. 129] Q. Who was present at that time?

A. A Mr. Meyer.

Q. Who else was present?

A. A Mr. Murray. He was General Manager of the Cadillac Company.

Q. What happened then?

A. Mr. Meyer took a position in the front seat of the automobile. I entered the trunk and Mr. Murray closed the trunk lid. I heard a conversation between——

Mr. Walsh: I object to that, your Honor.

Mr. Emanuelson: I think it is perfectly proper, your Honor, based on his cross examination.

The Court: Objection sustained. I do not see how it is material at this time.

Mr. Emanuelson: Well, it certainly goes to the witness' direct testimony.

Mr. Walsh: Nobody has testified anybody heard anything in that automobile yet.

Mr. Emanuelson: Well, of course, there was not too much objection to your going into such great detail about what could be done and what could be heard in the trunk.

The Court: Objection sustained.

Mr. Emanuelson: The reason for it is that he made such a point of the material between the front seat and the [fol. 130] trunk, so that obviously——

The Court: That has not been disputed so far, has it?

Mr. Emanuelson: Well, I imagine he will.

Mr. Walsh: Well, I don't know. We have not had a witness yet who has testified—from what counsel says now, I am assuming somebody is going to testify he heard something, but so far nobody has.

The Court: It may be proper rebuttal testimony, but I do not see how it is material at this time.

Mr. Emanuelson: All right, Judge. I would like to offer the Exhibits that this witness has identified, in evidence.

They would be all the exhibits from 1 to 10, that I am offering now. 11, 12 and 13 you sustained the objection to.

The Court: They may all be admitted into evidence with the exception of the three photographs numbered 11, 12 and 13.

(The Exhibits previously marked Government Exhibits 1 to 10 both inclusive for identification, were thereupon received in evidence as Government Exhibits 1 to 10, respectively.)

[fol. 131] Mr. Emanuelson: That is all, your Honor.

Mr. Walsh: Just one more question.

Recross Examination

By Mr. Walsh.

Q. You said when you were on 74th Street, I believe it was, east of St. Lawrence and west of Champlain, that you could not see the trunk too well?

A. The condition of the trunk. I could not see the condition of the trunk.

Q. By "the condition", what do you mean?

A. Well——

Q. Whether it was open or closed?

A. That's right.

Q. And the trunk at all times was in such position that Bryson could get out by himself, wasn't it?

A. Yes.

Q. The clip was fastened—what Exhibit is that?

Mr. Emanuelson: 1.

By Mr. Walsh:

Q. Government Exhibit 1 and these ropes that you described were fastened so that Bryson could get in and out?

A. Yes, sir.

Q. Isn't that right?

A. Yes.

[fol. 132] Q. And that car was always in your view, was it?

A. Yes, sir.

Q. So that you could observe whether he was in or out?

A. That is right.

Q. It was always in your view?

A. Yes, sir.

Q. Didn't it park at certain times with its lights out and your lights out?

A. Yes, sir.

Q. How many times?

A. Once from the time it left 70th and St. Lawrence until it reached 74th Street.

Q. Did it ride without lights or did you ride without lights?

A. I rode at intermittent periods without lights.

Q. Did the cars stop?

A. The Cadillac?

Q. Yes, during that period.

A. Once on 72nd Street.

Q. Once? That is, prior to the 74th Street incident?

A. That is right.

Q. Did it always stop in front of a street light?

A. No, sir; not that I recall.

Q. But you were able to watch the trunk all the way [fol. 133] around?

A. Yes, sir. You see, if the lid had flown all the way up we would have seen it, but I couldn't tell if it was partially open or not at all.

Q. It is your conclusion that Bryson remained in the trunk all the time, is that it?

A. Yes, sir.

Mr. Walsh: That is all.

Mr. Emanuelson: That is all.

(Witness excused.)

The Court: Call your next witness.

Mr. Emanuelson: Officer Bryson.

(The witness was thereupon duly sworn.)

JAMES L. BRYSON, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Emanuelson:

Q. Will you state your name, please?
A. James L. Bryson, B-r-y-s-o-n.
Q. You reside in Chicago, Illinois?
A. Yes, sir.
Q. You are employed by the City of Chicago in the [fol. 134] Police Department of said City?
A. Yes, sir.
Q. In what capacity and department?
A. I am assigned to the Detective Bureau in the Narcotics Section.
Q. How long have you been so employed?
A. I have been in the Narcotics Section over four years.
Q. Do you know the Defendant, Albert Roviaro?
A. Yes, sir.
Q. Do you see him in the Court Room?
A. Yes, sir.
Q. Would you point him out?
A. The gentleman sitting over to your left—I mean, to your right.
Q. To my right?
A. To your furthest right.
Q. In what color suit?
A. In the grey suit.

Mr. Emanuelson: Your Honor, may the record show that the witness Bryson identified the Defendant, Albert Roviaro?

The Court: It may so indicate.

By Mr. Emanuelson:

[fol. 135] Q. When was the first time you ever had occasion to see the Defendant, Albert Roviaro?
A. I saw him the first time on June—about June 22nd.
Q. Where was that?
A. At 72nd and Michigan Avenue.

Q. Did you see him again after that?

A. I have seen him around his home there several times.

Q. In other words, you saw him several times after the first instance?

A. Yes, sir.

Q. Now, on August 12th, 1954 at approximately five p.m. o'clock, were you employed in the capacity which you just stated you are presently in?

A. Yes.

Q. What occurred, if anything, at that time?

A. About five p.m.—shall I go ahead?

Q. Go ahead.

A. About five p.m. on August 12th we had a meeting, Officer Sims, my partner, Agent Durham and Agent Fields. We had a conversation with a special employee, an informer——

Mr. Wash: I object to the characterization of "informer," as being purely a conclusion.

Mr. Emanuelson: Your Honor, we have been through [fol. 136] that before. We filed briefs on it. I think it is generally understood, and in fact I think the case I gave your Honor——

The Court: Objection overruled. Proceed.

Mr. Emanuelson: I might say, if the Court please——

The Court: Proceed.

Mr. Emanuelson: I will advise the witness to call him John Doe, and then there will be no objection.

The Court: All right.

By Mr. Emanuelson:

Q. Would you continue, Mr. Bryson.

A. We had a conversation, the five of us, and pursuant to that conversation I drove Agent—I drove my partner——

Mr. Walsh: I move to strike "pursuant to the conversation." It may sound technical, but it is not technical, Judge. In substance he is trying to get in what happened during the conversation, as a result of or pursuant to which he did something.

The Court: You may proceed.

Mr. Walsh: Is that objection overruled, Judge?
The Court: Yes.

By Mr. Emanuelson:

Q. Tell us what happened after the conversation.
A. After the conversation I drove John Doe's car to [fol. 137] the Tivoli Theatre. That is located on Cottage Grove.
Q. What kind of an automobile was that, if you know?
A. This was a 1954, four-door Cadillac sedan.
Q. Do you know the Model number?
A. This was a light blue Cadillac.
Q. Had anything taken place prior to your leaving for your destination?
A. Yes, sir.
Q. What, if anything?
A. We made a search of the person of John Doe and we also searched the automobile.
Pursuant to that we went to the Tivoli Theatre.
Q. What happened then and there?
A. Well, I let out in front of the theatre my partner, George Sims, and John Doe.
Q. Then what happened?
A. From there I went home and I had my dinner.
Q. You mean you took the automobile with you?
A. Yes, sir.
Q. Where did you take it? To your residence?
A. I drove it to my home.
Q. What did you do with the automobile when you got home?
A. I locked the doors and went inside and had my [fol. 138] dinner. About nine—about five minutes to nine I left there and went back to the theatre.
Q. The Tivoli Theatre?
A. Yes, sir.
Q. Then what happened there?
A. Well, there I saw my partner George Sims, and John Doe. They were waiting for me outside, and I picked them up and from there we drove to 75th and Prairie Avenue.
Q. What happened there?

A. Well, there we had a further conversation, and pursuant to that conversation——

Mr. Walsh: I object to that.

Mr. Emanuelson: Do not say that.

By Mr. Emanuelson:

Q. You had a conversation. What did you do after the conversation, if anything?

A. After the conversation Agent Fields and Durham conducted another search of this automobile.

Q. You mean the 1954 Cadillac you previously referred to?

A. Yes, sir.

Q. That is the same automobile you are testifying to?

A. Yes, sir.

Q. What did they do in their search, if anything?

[fol. 139] A. Well, they had their—they were looking in the glove compartment and on the interior there, while I went to the rear of the car and had John Doe to open the trunk, and there I put a blanket in that I had gotten from my home.

After that John Doe was searched, and from there—about ten minutes to ten I got into this car, into the trunk of this car, and we had a further conversation and we drove to a location.

Q. Where?

A. Well, St. Lawrence and 70th.

Q. What happened there, if you know?

A. Well, we waited there a long time. I held a conversation with John Doe all this time.

Q. How did you hold a conversation with John Doe?

A. Well, I was in the trunk of the car talking to John Doe in front.

Q. Were you in the trunk all the time you had this conversation with him?

A. I was in the trunk, yes.

Q. Where was he?

A. He was in the front seat.

Q. All the time?

A. Yes, sir.

[fol. 140] Q. Go ahead.

A. So I looked at my watch—I had a flashlight, and I looked at my watch and it was about five or six minutes after eleven, so I told John Doe, I said, "It looks as if nothing is going to happen"——

Mr. Walsh: I object to this, your Honor.

The Court: Objection sustained.

The Witness: A few minutes later the Defendant came and got in the car.

Mr. Walsh: I object to this, unless it is something he saw. He says he was in the trunk of an automobile.

Mr. Emanuelson: All right. It appears that he has X-ray eyes.

By Mr. Emanuelson:

Q. Why don't you go back a little bit and describe how you got into the trunk and what mechanisms you used while you were in the trunk?

A. Well, this gadget here (indicating) was given to me by Agent Durham.

Q. Referring to Government Exhibit 1?

A. Yes.

Q. What was the purpose of that, if anything?

A. To place it over the lock of the trunk, to keep me from being locked in inside.

[fol. 141] Q. In other words, it wouldn't shut completely——

A. No, sir.

Q. —is that it?

A. No. It would come down in here where this indentation is (indicating).

Q. How much space did it leave open?

A. Well, you could barely see the space. In fact, you couldn't see it if you didn't know it. You couldn't see it, if I would close it all the way down.

Q. How did you control the opening and closing of the top of the trunk?

A. Well, I had a string we put up inside to hold onto. Of course, I very seldom used it. I used my left arm most times to hold the door down—that is, the trunk.

Q. At this time you had a rope or something attached to the top of the trunk?

A. Pardon me?

Q. You had a rope attached to the top of the trunk?

A. Yes.

Q. To pull it up and down?

A. Yes.

Q. You could pull it down or let it go up?

A. Yes.

Q. Now, referring to this time of about 11:00 p.m. on [fol. 142] August 12th, 1954, tell us what happened, if anything, at that time.

A. After we drove to this location, about seven or eight minutes after eleven, someone got into this car and spoke to John Doe and John Doe in turn spoke, and this person said, "Gee," he says, "I've been trying to reach you"——

Mr. Walsh: I object to this, your Honor.

Mr. Emanuelson: All right.

Mr. Walsh: There is no showing it is in the presence of the Defendant.

Mr. Emanuelson: Oh, yes. Now you are back to the Goldman case where they used a Dictaphone and it has been allowed—the Supreme Court has so held—and then there is the other case, I have forgotten the name, where the microphone was concealed, but I think the best case is the Dictaphone case where they put it against the wall and they can't even be in the room and the conversations are admissible.

The Court: What is the basis for the objection?

Mr. Walsh: Well, my basis is that the person who is having the conversation is not identified.

Mr. Emanuelson: Well, if he will go on further, I am sure he can distinguish between the voices and by elimination he knows which is which.

[fol. 143] Mr. Walsh: It may be one of the problems of your proof, but it still is one of the things we are very much concerned with in connection with this John Doe.

Here we have a situation, Judge, where he is going to put in a conversation between some person who got into an automobile and had a conversation with a man whose identity they will not reveal, John Doe. I do not think they can do it, properly.

Mr. Emanuelson: I do not know why not, your Honor.

Mr. Walsh: I say that most respectfully. That is the basis for my objection. I think it is clearly inadmissible. There is no showing yet——

Mr. Emanuelson: It certainly is admissible based on the two cases I mentioned.

Mr. Walsh: Well, the Goldman case——

Mr. Emanuelson: And then in the On-Lee case——

Mr. Walsh: In the On-Lee case there was complete identification of the party.

Mr. Emanuelson: In the Goldman case there was no identification.

Mr. Walsh: Yes, there was.

Mr. Emanuelson: If necessary we can go back and show the purpose of this rendezvous or meeting, and we can go back even further and show that he knew—he has testi- [fol. 144] fied he saw Roviaro before, and I am sure we can go back far enough and we can get his voice and this man can distinguish between the two.

He said he was talking to John Doe, conversing with him right along, so he knows that whoever gets in is going to be the——

Mr. Walsh: Your Honor, I think we are very close to the crux of it. It is whether or not this man can describe the conversation of a person he cannot identify, that he does not see and does not know.

Mr. Emanuelson: I think this, your Honor: He can testify to the conversation he heard, whatever he heard, even though we go so far as to admit he could not identify it.

Mr. Walsh: Out of our presence, with a person we don't know?

Mr. Emanuelson: You have to prove it is out of your presence. You have to prove that.

Mr. Walsh: Oh, well, excuse me. I won't argue that.

The Court: I think it is subject to objection unless the witness can testify he is familiar with the voice of the party in question.

Mr. Emanuelson: Well, your Honor, of course that is not his testimony, but it is Agent Durham's testimony that he [fol. 145] saw Roviaro get into the Cadillac, so you cannot say that you do not have someone who saw that man get into the Cadillac.

Now, he hears the conversation between the man who gets into the Cadillac and John Doe, and there is corroborating evidence as to others who saw him get in, so I think as the testimony goes along your Honor will see the connection between the two.

You have testimony already that puts Roviaro in the Cadillac at this precise time, and he also testified that no one got in and no one got out except John Doe, who was in there all the time until Roviaro came in, so there is no question as to whether he was in the car at this time.

The Court: Well, he may testify, and I will strike it if I do not think it is competent.

By Mr. Emanuelson:

Q. Will you continue, Mr. Bryson.

A. When this party got into the automobile he said to John Doe, "Hi", so John Doe said, "Hello."

He says, "I had to wait a long time for you", so he said, "Yes, I know", he said, "I tried to get you at the place and I tried to call you at home also", he said, "I wanted to let you know I'd be an hour late; I wanted you to [fol. 146] come at eleven rather than ten," so he says, "I'm glad you waited."

He said, "Drive this way", and the car started and began to move.

After a minute or so this party that got into the car asked John Doe, he says, "How are things?" so John Doe answered and said, "Things are hot", and this party said, "Are you hot?" and John Doe answered, "No, not in particular."

He said, "Things are hot in general." He said, "Yes, I know what you mean." He said, "I picked up a tail from my home the other afternoon", so he said, "pull over to the curb quick and cut off your motor and turn out your lights."

He said, "I think we've picked up a tail already."

So they pulled over and the car came to a stop, the motor shut off, and after a minute he says, "I guess they're gone by now", and he said, "You can continue", or words to that effect, "further down."

He said, "What about the other money you owe me?"

so John Doe said, "Well, I'm doing the best I can." He said, "Things are so hot now it's taking me a long time to put it all down."

[fol. 147] "Well", he said, "do what you can, anyway." He said, "I brought you three pieces this time."

By that time we had come to a location, and when we came to this point the car stopped.

He said, "Pull right over here and stop", and the car pulled over and stopped and I got a signal and after that signal I raised up the trunk of the car just a trifle where I could see.

Q. Show the Judge, so he can see.

A. I raised the trunk of the car up about that much (indicating). I peeped out and I could see the Defendant go to a spot near a tree and pick up a package.

It was rather dark, and I couldn't tell exactly what it was, but he came back to the car and said, "O.K.", he said, "Here it is", and he says, "I'll call you in a couple of days", and after that I waited about a minute, maybe not quite that long, and Agent Durham came by and hit on the trunk of the car and said, "O.K., Jim; you can come out now", and I got out of the trunk and Agent Durham had the package in his hand.

By that time the others came up and we all had a conversation.

Mr. Walsh: Who were the others?

The Witness: Agent Fields and my partner, George [fol. 148] Sims.

By Mr. Emanuelson:

Q. And John Doe? He was there, was he?

A. And John Doe.

Q. Where was he sitting?

A. He was still sitting on the driver's seat.

Q. In the front seat of the Cadillac automobile?

A. In the front seat, yes, sir.

Q. Then what happened?

A. After that we drove to 69th Street where the other cars were located, and Agent Fields—Agent Durham performed a field test on one of the packages, one of the small

packages in this container, and after that was done, why, we proceeded then to go to the Defendant's home.

We went there and we didn't see the car, so we went to some of his usual haunts and we wasn't able to locate him at either of the places, so we proceeded back to his home and after we came back to the home we saw the car.

Q. What time was that?

A. Well, that must have been about 12:25 or '30; somewhere about that time.

Q. All right.

A. Then we went to the front door, and I was with Agent Durham, along with my partner, George Sims, and [fol. 149] knocked on the door.

The Defendant came down and he had taken off his clothes and had on a pair of pajamas, the bottoms only; he didn't have the tops on.

Agent Durham identified himself and the Defendant opened the door. He told him was under arrest for the sale of narcotics, and they had a further conversation, so we all got out of the house and I rode back in the Defendant's car with Agent Durham.

Q. Where was the Defendant?

A. He was in the middle, in the front seat of his car.

Q. Sitting in the front seat?

A. Yes.

Q. In whose automobile was it?

A. The Defendant's car.

Q. Who was driving that car?

A. Agent Durham was driving it.

Q. Then what happened after that?

A. Well, we proceeded down to 11th and State Street, to our lock-up. On the way down we had a conversation with the Defendant.

I think Agent Durham had the conversation first, and he told him, or asked him——

Mr. Walsh: I want to restate the objection I made to [fol. 150] this conversation. It obviously appeared from Durham's description that there was no confession, and I do not think it is admissible.

The Court: Objection overruled. He may answer.

A. Agent Durham told him, he said, "Well, now, we got you wrapped up." He said, "Do you want to tell us about your connection?"

So he said, "Well," he says, "I don't know anything about that." He said, "I don't want to get anybody else in trouble."

He said, "You got me", and he said, "I've stood up twice before", he said, "and I can stand up again."

So after that I asked him, I says, "Well", I says, "We're going to put you down in this tank and let you see how these dope fiends live."

I says, "You've got kids yourself", and I said, "now you go around here selling narcotics like this", and I said, "supposing someone gave your kids something like that?"

So he said, "Well, I never looked at it that way", so we went on down to our office where we had a further conversation with the Defendant and all the other arresting officers and John Doe.

[fol. 151] There we put our initials on these packages and Agent Durham took them in his possession.

Q. I show you Government Exhibit 2.

A. Yes.

Q. Have you seen that before?

A. Yes, sir.

Q. Are your initials on there?

A. Yes.

Q. When did you see that?

A. I saw that the first time when I raised the trunk of the car and saw the Defendant pick it up.

Q. Then you saw it later, did you?

A. Yes, sir.

Q. I show you Government Exhibits 3, 4 and 5.

A. Yes.

Q. That is your initials on Government Exhibit 4?

A. Yes, sir.

Q. And Government Exhibit 5? Are your initials on there?

A. Yes.

Q. How about the other one?

A. Yes.

Q. Are they on 3?

A. Yes.

[fol. 152] Q. What was done with the substance that was in those glassine bags at that time?

A. Well, at the time we all initialled the substance and Agent Durham took them in his possession, but from there on I don't know what happened to them. He took them over to the Federal Bureau of Narcotics Office.

Q. I show you Government Exhibit 8.

A. Yes.

Q. I ask you if you have ever seen that substance before with relation to the other exhibits?

A. (No answer.)

Q. I am asking you—I will withdraw the question.

Can you tell the Court what if anything was in these glassine envelopes which you have identified?

A. There was a white substance in each one of those.

Q. Now, are each of the envelopes in the same condition except for the change of color, when you first saw these glassine envelopes?

A. They were in the same condition other than for the color, and they didn't have any writing on them.

Q. Did they have any Government stamps on them or anything like that?

A. No, sir.

Mr. Emanuelson: You may cross examine.

[fol. 153] Cross Examination.

By Mr. Walsh:

Q. There was a conversation at 11th Street when Roviaro was brought in, is that right?

A. Yes, sir.

Q. Did John Doe say anything in that conversation?

A. I don't remember if he did or not.

Q. Well, there was a conversation while both of them were present, the Defendant and John Doe, right?

A. Yes, sir.

Q. And you were present?

A. At intervals, yes, sir.

Q. At 11th and State?

A. At intervals, yes.

Q. What if anything did you hear John Doe say?

A. I don't remember exactly what he said.

Q. Well, the substance of it, then.

A. I can't remember exactly what he said because of the fact I had other duties to perform.

Q. Well, did he say anything with reference to an acquaintanceship or any prior association with this man or any transaction with this man?

A. Yes. In the presence of the Defendant, to make the Defendant——

[fol. 154] Q. Forget your purpose, now. What did he say?

A. Well, he said he didn't know the Defendant here. He said he had never seen him before.

Q. That was the John Doe that was sitting in the front seat of the Cadillac?

A. Yes, sir.

Q. When did you last see John Doe?

A. I don't remember exactly when I did see him last.

Q. When did you first meet him?

A. I first met him about four years ago.

Q. Was he a special employee at that time?

A. He had been prior to that; when I first met him, he was.

Q. Now, you opened the trunk of the car, you said, about that far, that much (indicating)?

A. Yes, sir.

Q. Would you give your estimate in inches? Will you make that indication with your hand again?

A. I'd say about that much (indicating).

Q. What part of the trunk did you open that much?

A. Well, the cover to the trunk there.

Q. Well, your span would run—first, the door is on hinges, isn't it?

A. Yes, sir.

Q. If you had it open—was it three inches you indicated [fol. 155] a few minutes ago, approximately?

A. Yes.

Q. If you had it open three inches at the point even with the hinges, then you would have had it open perhaps ten inches or a foot at the bottom, right?

A. I'm speaking of the bottom there. I'm speaking of

when you enter a trunk and you raise it up, it was that far (indicating).

Q. Well, the greatest opening you opened it at any time was three inches, right?

A. I'd say approximately that.

Q. Well, we are approximating. You are making the best guess you can under the circumstances.

A. Yes.

Q. And this was at night?

A. Yes.

Q. Now, your car was not very far from a light, was it?

A. No. We were just beyond the light. The light was just to the east of where we had stopped, and east of the tree.

Q. Just to the e-st?

A. Yes.

Q. How far east?

A. I don't know exactly. Five or six feet, I suppose.

[fol. 156] Q. Where was your head?

A. My head——

Q. With reference to this opening.

A. My head was resting on the driver's side and my feet was behind the spare tire, over to the right-hand side of the car.

Q. You say you opened the trunk that much (indicating), about three inches?

A. About that.

Q. Yes.

A. Maybe possibly it wasn't that much. It was about that.

Q. Well, was it more?

A. It could have been.

Q. How much more could it have been? Four inches at the most?

A. (No answer.)

Q. Shall we say two to four inches, then?

A. It was in that radius.

Q. Well, we can't measure it now, so you don't have to worry about it.

A. Just enough for me to see.

Q. All right. You looked out?

A. Yes, sir.

[fol. 157] Q. You were lying then on what side?

A. I was lying on my right side, and my feet was up behind the spare tire and the back part of me was up near the driver's side.

Q. You were on the left-hand side of the car as the car went forward?

A. Yes.

Q. Your head was on the left-hand side?

A. I could see to the right.

Q. To the rear?

A. I could see to the right, yes.

Q. You could see——

A. To the rear and right.

Q. Did you identify the Defendant at that time?

A. I could state that it was the Defendant, yes.

Q. Did you see him completely?

A. I saw him completely, yes.

Q. His whole body?

A. When he bent down I saw his whole body, and when he came out I could only see along here (indicating).

Q. Which way was he facing when he bent down?

A. Well, he walked by the car to go over by the tree.

Q. Yes. Then he bent down?

A. Yes, sir.

[fol. 158] Q. Which way was he facing when he bent down

A. Well, he was facing on an angle from the—looking north, northeast.

Q. That was away from you?

A. To an extent.

Q. Well, it was almost completely away from you, wasn't it?

A. No, it wasn't completely away from me. I could see more of his side than I could—I could see more of his right side than I could his left side.

Q. You could see more of his back than anything else, couldn't you?

A. Well, I could see the side of his face.

Q. Not when he bent down, though.

A. Not when he bent down.

Q. How long did he stay bent down?

A. Only a second.
Q. A full second, do you think?
A. Well, about that.
Q. What did he do?
A. He picked up a package.
Q. Did you see the package before he picked it up?
A. Not before he picked it up, but I saw it when he picked up something in his hand.
[fol. 159] Q. You knew it was something?
A. Yes, sir.
Q. Did you see what it was?
A. Well, not in particular.
Q. Let's get this straight. The rear of your car is facing east, right?
A. No, Sir; west. See, the car was on, the car was facing west.
Q. Yes.
A. When he got out on the right side he walked back a few steps behind the car and over to his left and reached down in this manner (indicating), where he would be pointing more or less northeast.
Q. Yes, and you were pointed east?
A. I was looking north, looking out from the side like this (indicating).
Q. Well, you couldn't get your head out through the three inches of opening, could you?
A. No. I was looking out that way (indicating).
Q. You were up against it looking out?
A. Yes, sir.
Q. And trying to see what this individual was doing, [fol. 160] is that right?
A. Yes, sir.
Q. You saw him bend down and pick something up?
A. Yes, sir.
Q. His back was to you, was it not?
A. No. His back wasn't altogether to me.
Q. I see. But you could not see the package?
A. No. I could see something in his hand.
Q. Well, wasn't his hand—wasn't his body between you and the hand?
A. No, because I was looking from an angle. See, I was looking——

Q. Didn't he walk at an angle toward that tree?

A. He walked—the car is parked like this (indicating) facing west.

Q. Yes.

A. He got out of the car on the opposite side of the driver.

Q. Yes.

A. Then he came back this way (indicating) and went on an angle like that and stooped down and he was faced on the side in this manner (indicating), and reached down there.

Q. How many feet east of you, or how many feet east [fol. 161] of the trunk of your car, the rear end of your car, was he when he made this pick-up?

A. I'd say only a few feet.

Q. How many feet?

A. Well, I'd say five or six feet at the most.

Q. How many feet north of your car?

A. North of my car?

Q. The Cadillac.

A. Well, it was about the same, I suppose, about the same distance.

Q. He did not turn to show it to you, did he?

A. No.

Q. He went over and picked it up and then he returned back to the automobile, is that right?

A. He went on an angle and picked up the package, stooped down like that (indicating), and turned back around and went out of my sight, out of my vision.

Q. Did he hold it out——

A. No.

Q. (Continuing)—so people could see it?

A. I just saw him when he reached down and picked up the package.

Q. Then what did he do?

A. Went over to the car and said, "Here it is." He [fol. 162] said, "I'll call you in a couple of days."

Q. That was the last you saw him until you took him under arrest?

A. At that time, yes, was the last I saw him.

Q. Until you went to make the arrest?

A. Well, I could see his car parked down on St. Lawrence, I believe it was.

Q. This was after he left the Cadillac?

A. Yes, sir, and when Durham came up——

Q. You got out of the car, or you got out of the trunk?

A. Yes.

Q. And talked to Durham about the package, right?

A. Durham got out of his car and came back and hit on the trunk and said, "O.K., Jim. You can come out."

I came out, and a car was pulling away off of St. Lawrence.

Q. That was around the corner?

A. Well, it was parked over on an angle.

Q. Well, how far south of 74th was it?

A. I don't know how far south it was.

Q. But you walked up to the corner, or you walked up towards the corner to see it?

A. I saw a car pulling away, and I think Durham said, "There he goes now."

[fol. 163] Q. Where were you when you saw the car pulling away?

A. Well, I was just to the front of the Cadillac that was parked there.

Q. Is there a building on the southwest corner at 74th and St. Lawrence?

A. There may be. I am not sure. There are buildings along there, I know.

Q. From what point did you see that car take off, this automobile that you say was the Defendant's? When you saw it leave, from what point south of 74th did it leave?

A. I really don't know.

Q. Well, as a matter of fact, did you actually see the car——

A. I saw a car.

Q. (Continuing)—or are you just telling us what Mr. Durham told you?

A. No. I wasn't saying what he said. I saw a car pull out and he said, "There he goes now."

Q. Well, in other words, you had time to get out of the trunk and speak to John Doe—you did speak to him when you got out, didn't you?

A. Well, at that time I didn't.

Q. You didn't?

A. I asked Durham if he had gotten the stuff and he [fol. 164] said yes.

Q. Was Durham right there at the automobile at that point?

A. Well, he's the one that hit on the trunk and told me to come out.

Q. And he waited for you to come out?

A. He went up, and I think he was engaged in conversation with John Doe.

Q. I see.

A. So I came out and I said, "Did you get the stuff?" and he said yes, and I walked just to the front and he said "Chick is just leaving now."

Mr. Walsh: That is all—just a minute.

By Mr. Walsh:

Q. Do you recall the weather conditions that night?

A. Yes, sir.

Q. Will you tell us about them?

A. Well, to the best of my knowledge it was a clear night. It was hot, but I think it was clear. There was nothing unusual about it. A typical August night.

Q. It was hot in the trunk, wasn't it?

A. Yes, sir; very hot.

Mr. Walsh: That is all.

Mr. Emanuelson: Now we are back to the same point we [fol. 165] were before with Mr. Durham when he asked the witness what John Doe said, as to his knowledge of the Defendant, Albert Roviaro. At that time you will recall I asked Mr. Durham who he saw Roviaro with on June 22nd, 1954, and June 28th, 1954. I propose to ask this witness the same two questions.

The Court: You may proceed.

Redirect Examination.

By Mr. Emanuelson:

Q. Mr. Bryson, you said that you first saw Albert Roviaro on June 22nd, 1954, is that right?

A. Yes, sir.

Q. Can you tell the Court where you saw him?

A. Well, my car was parked on 72nd Street just west of Michigan Avenue, on the south side.

Roviaro's car pulled up from the east and stopped almost parallel with our car. My partner, George Sims, was with me, and other agents were secreted in that vicinity, and he was driving the car.

He drove up, he got out of the driver's side, put a flashlight in his pocket, and walked over on Michigan Avenue where John Doe's car was parked on the northeast corner just north of 72nd Street on the east side of Michigan Avenue.

[fol. 166] Mr. Walsh: I object and move to strike this, your Honor. I could not anticipate what he might answer.

The ground for my objection and motion is this: The only thing I proved by getting the answer to what if anything did John Doe say, is what John Doe said. I do not vouch for John Doe's knowledge. I have not called him as a witness. In fact, I do not know him.

Now, it is not a question of whether there is a doubt as to whether what he said was the truth. It is a question of did he say that? Did he deny it?

Mr. Emanuelson: Well, your Honor, if we were to ask either of these witnesses whom he saw him with the first time, of course he would object as to that, and if they would mention that John Doe and Roviaro were together, but he asked him the question himself and put it in issue, so it goes to the credibility of this witness as to whether or not he can testify as to his knowledge of Roviaro and John Doe.

The Court: It may stand. Proceed.

Mr. Emanuelson: No further questions.

The Court: We will take a five-minute recess, gentlemen.

(Whereupon a short recess was taken, after which the [fol. 167] following further proceedings were had herein, to-wit:)

The Court: You may proceed.

Mr. Walsh: I would like to ask a few more questions of this gentleman in line with what I asked the other witness. I assume your ruling would be the same, but I would like to ask them now as part of my cross examination.

The Court: Very well. You may proceed.

Recross Examination.

By Mr. Walsh:

Q. Officer, do you know John Doe by any other name?

A. Yes, sir.

Q. What is that name?

Mr. Emanuelson: Your Honor, I am going to object to that question.

The Court: Objection sustained.

By Mr. Walsh:

Q. Do you know whether John Doe is alive?

Mr. Emanuelson: I am going to object to that question, too, your Honor.

Mr. Walsh: We are in this situation, Judge: The conversation with John Doe is in the record and the record is replete with his statements.

We believe he is dead, but unless we know who he is [fol. 168] we cannot say that. I think we are entitled to know who he is so we can see him and find out what he has to say.

If he is dead, obviously the conversations are not admissible on that basis.

Mr. Emanuelson: If the Defendant wants to establish that John Doe is dead, then I am asking the Court for leave to determine, if he is dead, what caused his death.

I want to go into that, if he knows he is dead. They can find out by——

Mr. Walsh: Are you intimating that we caused it?

Mr. Emanuelson: No.

Mr. Walsh: Then I don't——

Mr. Emanuelson: You seem to have better knowledge about this John Doe than we do.

Mr. Walsh: No, I don't.

Mr. Emanuelson: Your Honor, if you did strike all the testimony relating to any conversations with John Doe, I do not think it would affect the Government's case as far as proving the allegations in the indictment are concerned.

I still think the case is based on the eye-witnesses, and there were two so far who have testified, and I [fol. 169] do not think that if your Honor feels the Defendant is being prejudiced and if your Honor wants to strike the testimony that relates to any conversation between John Doe and other persons, that it will affect the Government's case one bit.

However, I do not think that it is a point to be made by the Defendant, when he brings out these conversations, and then when it does not establish something to their benefit they try to show something else by him.

I stated to the Court, and as I understand it, the reason his name has not been disclosed is because he is acting as a Government employee in other cases and it would help other persons in other matters that are pending.

Mr. Walsh: Judge, all this goes back to what I consider is a fundamental misunderstanding of the role of an informer.

If an individual is merely an informer, he says he has committed an offense, a crime. That is an informer.

Now, if I go further and help to enmesh him in crime by setting up a situation for him to commit a crime—I am not talking about entrapment, now, but if I op- [fol. 170] erate a transaction with him——

The Court: Well, if there is an objection, the objection will be sustained, gentlemen. Proceed.

Mr. Emanuelson: Are you through?

Mr. Walsh: Yes. That is all.

Mr. Emanuelson: That is all.

(Witness excused.)

Mr. Emanuelson: Mr. Sims.

(The witness was thereupon duly sworn.)

GEORGE T. SIMS, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Emanuelson:

Q. Will you state your name, please, sir?
A. George T. Sims.
Q. You reside in the City of Chicago?
A. Yes, I do.
Q. You are employed by the City of Chicago in the Police Department?
A. Yes.
Q. In what Department and in what capacity?
A. Assigned to the Narcotics Bureau, Detective Bureau, of the Chicago Police Department.
[fol. 171] Q. How long have you been so employed?
A. I've been employed eight years, and assigned to the Narcotics Division for four years.
Q Do you know the Defendant Albert Roviaro?
A. Yes, sir, I do.
Q. Do you see him in the Court Room?
A. Yes.
Q. Will you point him out, please?
A. The gentleman sitting over there (indicating) in the grey suit.

Mr. Emanuelson: May the record show that the witness has identified the Defendant, Albert Roviaro?
The Court: It may so indicate.

By Mr. Emanuelson:

Q. When was the first time you saw Albert Roviaro?
A. I believe it was on the night of the 22nd of June about ten o'clock p.m.
Q. 1954, of course?
A. 1954, yes, sir.
Q. Where was that?
A. 72nd and Michigan, in the vicinity of 72nd and Michigan.
Q. Who was with you?

A. Officer Bryson, my partner.

[fol. 172] Q. On August 12th, 1954, at approximately five p.m., were you employed in the capacity you previously stated?

A. Yes, I was.

Q. Will you tell us what happened at that time and place?

A. About five o'clock p.m. on August 12th, 1954, Officer Bryson and I went to the vicinity of 75th and Prairie Avenue in Chicago, Illinois.

Q. Was there anybody else present?

A. Yes, sir.

Q. Who?

A. Agent Durham, Federal Bureau of Narcotics, an informer, Officer Bryson and myself.

Mr. Walsh: I object to the characterization of "informer."

Mr. Emanuelson: May I state on the record and ask the Court to advise the witness—I will do it myself.

Will you please call him "John Doe" and delete the "informer"?

The Witness: All right.

Mr. Emanuelson: Just John Doe.

The Witness: All right.

By Mr. Emanuelson:

Q. Continue, Mr. Sims.

[fol. 173] A. John Doe, Officer Bryson, Agent Durham and myself met at the Corner of 75th and Prairie Avenue, Chicago, Illinois, at about five o'clock p.m. on August 12th, 1954. We had a conversation at that point.

Q. What happened then, if anything?

A. We inspected the automobile of John Doe.

Q. What kind of an automobile was it, if you know?

A. A 1954 Cadillac, four-door sedan.

Q. Yes.

A. We checked the interior, we checked underneath the hood and we looked into the trunk of this car.

After making our inspections of the automobile, we drove around the block once or twice with Officer Bryson in the trunk of the car.

After that we had a further conversation somewhere between 5:30 and—in the vicinity thereof, and then Officer Bryson drove John Doe and myself to the Tivoli Theatre.

Q. Where?

A. 63rd and Cottage Grove.

Q. In Chicago?

A. Chicago, Illinois.

Q. Go ahead.

A. We got out of the car and we went into the theatre. [fol. 174] John Doe and I stayed in the theatre until about ten minutes after nine, and at about ten minutes after nine we left the movie and waited outside where Officer Bryson picked us up in this same automobile that we had previously inspected.

Q. Had anybody else been with you and John Doe in this interval between five o'clock p.m. and the time you were picked up about ten p.m.?

A. No one we recognized and no one we contacted. A lot of people were in the show, but——

Q. Were you with him?

A. Yes.

Q. What happened at that time, 9:10?

A. Officer Bryson drove up. We got into the car. John Doe got in the front seat and I got in the back.

We drove back to 75th and Prairie Avenue. When we arrived at that location Agent Durham and Agent Fields were both there in their automobiles.

At that location we had a conversation and after the conversation we searched John Doe. After searching John Doe, while the search was being conducted on John Doe, a search was being conducted on the automobile.

After the search of the automobile——

Mr. Walsh: Excuse me for interrupting, but I think it [fol. 175] should be made clear as to who searched who and what.

By Mr. Emanuelson:

Q. Will you tell the Court who searched who, and who searched what part of the car, if it was done?

A. I and Agent Durham searched John Doe and Agent

Fields searched the interior of the car. Agent Durham and Officer Bryson examined the trunk of the car.

After this was done we had a further conversation. John Doe got into the car and Officer Bryson got into the trunk of the car——

Q. What time was this?

A. This was after 9:30 p.m. Around 9:30 or 9:35.

Q. All right.

A. After Officer Bryson got in the trunk of the car, the car drove off. We went to 75th Street and went east on 75th Street and was preceded by Agent Fields and myself and followed by Agent Durham.

We proceeded east on 75th Street to St. Lawrence Avenue and after arriving at St. Lawrence he made a left turn.

We parked—Agent Fields and I parked about 100 to 125 feet south of 70th Street on St. Lawrence facing north.

The car pulled past us. They went on up to 70th Street [fol. 176] and St. Lawrence.

The other car pulled past us and pulled around and parked on 70th Street facing St. Lawrence Avenue, which would be east of St. Lawrence.

Q. On which side of the street?

A. He parked on the south side of 70th Street facing St. Lawrence.

Q. Continue.

A. We remained in this location for approximately one hour and five or ten minutes, when we noticed an automobile occupied by two men, Caucasians, which was driven by the Defendant, Albert Roviaro.

He approached the location where the Cadillac was parked. He stopped the car with the motor running and got out of the driver's side of the car. As he got out of the driver's side of the car I saw the other occupant slide over underneath the wheel and make a left turn. He drove the car on to 70th Street and west on 70th Street.

Albert Roviaro got into the parked Cadillac which was occupied by John Doe. After he got into the car, a few seconds later, the motor started up and the car drove away.

Agent Fields and I drove off behind the car. They [fol. 177] drove to South Chicago Avenue and made a

right turn, making them head southeast. The drove southeast on South Chicago Avenue until they came to Cottage Grove. They hesitated there for the light and they made a right turn onto Cottage Grove Avenue and drove for approximately one block until they arrived at 72nd and Cottage Grove, and they made another right turn.

At that location Agent Fields and I did not make the turn. We went straight ahead to 73rd Street. We made a right turn on 73rd Street and drove over to St. Lawrence Avenue and approached 74th Street from the north.

As we approached 74th and St. Lawrence we saw the Pontiac that we had previously seen Roviaro get out of parked in the 7400 Block on St. Lawrence Avenue facing south.

We stopped north of 74th Street and waited. While we were waiting there, about five or ten minutes later we saw the Defendant, Albert Rovario, as he walked west on 74th Street and crossed the street on St. Lawrence and approached his automobile.

At that time we saw Agent Durham as he came to the corner and made a motion with his hand to us. We then joined Agent Durham and Officer Bryson and John [fol. 178] Doe. After we joined them Agent Durham showed me a package and we had a conversation.

After this conversation we drove back to 69th Street just west of Cottage Grove where we made the field test of the package. Agent Durham made the field test.

Q. I show you Government Exhibit 2.
A. Yes.
Q. Is this the package, or the covering you referred to?
A. Yes, sir, it is.
Q. Are your initials on there?
A. No, sir.
Q. I show you Government Exhibits 3, 4 and 5.
A. Yes.
Q. I ask you if you have ever seen those before?
A. Yes, sir, I have.
Q. Would you look at the other two? Look at 4 and 5.
A. Yes, I have.
Q. Are your initials on there?
A. Yes, they are.

Q. When did you see those?

A. I saw these on the night of August 12th, 1954, on 74th Street between Champlain and St. Lawrence Avenue at about 11:20 p.m.

Q. Did you see them again later?

[fol. 179] A. Yes, I did.

Q. Was there any substance in those envelopes?

A. Yes, there was.

Q. What substance was it? Any color to it?

A. It was a white powder.

Q. A white powder?

A. Yes.

Q. What was with it after that, if you know?

A. The white powder was field tested by Agent Durham and after the field test we signed the envelope, later on, and gave it back to Agent Durham.

Q. Was that the last time you saw it?

A. Yes, it is.

Q. After you left the location where the field test was made, did anything take place after that?

A. Yes. We had a conversation and we got into two automobiles.

Q. Who got into two automobiles?

A. Officer Bryson and Agent Durham got into Agent Durham's car, and Agent Fields, John Doe and I got into Agent Fields' automobile.

We drove out to the vicinity of 10459 South Forest Avenue, Chicago, Illinois. We circled——

Q. What did you do there if anything?

[fol. 180] A. We circled the block a couple of times and then we left that location and went to other locations south of that address, and we cruised around for approximately ten to fifteen minutes and then we returned back to 10459 South Forest Avenue where we saw the car of the Defendant.

Upon seeing his car we had a conversation. Agent Fields and John Doe remained in Agent Fields' car, which was parked at the rear of 10459 South Forest. Agent Durham, Officer Bryson and I went to the front door of that address and rang the bell.

Upon ringing the bell the Defendant came to the door

dressed in his pajamas, the bottom part and no top; his chest was bare.

He asked who it was and Agent Durham told him he was a Federal Officer, and he asked him what he wanted and he opened the door. When he opened the storm door we all stepped into the apartment and Agent Durham told him he was under arrest. He says, "You're being pinched."

Q. When you say "we", who do you mean?

A. Officer Bryson, myself and Agent Durham.

Q. Then what happened?

A. The Defendant was told to get dressed. Agent Durham and I went upstairs with him and waited while he put [fol. 181] his clothes on and had a conversation with his wife.

He told his wife—he asked me where he was going and I told him we were taking him to 1121 South State Street, to the Narcotics Bureau, and that his wife could come down to the Commissioner's Office the following morning.

After having the conversation with him and his wife, we then went outside—Agent Durham, Officer Bryson the Defendant and myself, went outside, and Agent Durham, Officer Bryson and the Defendant got into Agent Durham's car and Officer Bryson and I got into the—I mean Agent Fields, myself and John Doe got into his car, and we went down to 1121 South State Street.

Q. Who was driving the automobile of the Defendant?

A. On leaving his house——

Q. Before.

A. After arresting the Defendant, I believe I drove.

Q. Which automobile were you in?

A. I was in the Defendant's car from the house.

Q. You were in the Defendant's car?

A. I believe so. I am trying to remember now. At one time I was driving John Doe's car, but this time I believe——

Q. Are you sure of that?

A. Not sure. I'm a little hazy now on who was driving [fol. 182] from the house.

Q. Can you tell the Court what took place at 11th and State.?

A. Yes.

Q. In the Police Headquarters at 11th and State Street?

A. Yes.

Q. What did you do when you got there, and who was there?

A. After arriving at the building we went into the conference room, a small room——

Q. Who was there at that time?

A. Agent Durham, Officer Bryson, Agent Fields, myself, Agent Hanback, John Doe and Albert Roviaro, the Defendant.

Q. What happened then and there?

A. We had a conversation in the room about the activities of the night.

Q. All right. Now, all of the things you have testified to occurred in Chicago, Cook County, Illinois, the Northern District of Illinois, Eastern Division, is that right?

A. Yes, sir.

Mr. Emanuelson: No further questions, your Honor.

[fol. 183] Cross Examination.

By Mr. Walsh:

Q. How long were you in the Tivoli Theatre?

A. We arrived at the theatre around—before six o'clock, I believe it was.

Q. Then you say you saw no one. You said, "We saw no one that we knew." By that you mean that you saw no one that you knew?

A. Yes.

Q. And if John Doe saw someone he knew and did not tell you about it, you just don't know, do you?

A. No.

Q. Where did you sit in the theatre?

A. We sat in the extreme right aisle, at the rear, at the very—the last aisle, the last row right at the back where they have these chairs that you can move around.

Q. Chairs that you can move around?

A. They have chairs back in the back row, in the back section.

Q. Which side of John Doe did you sit on?

A. I sat on the aisle side. I sat on the left of John Doe.
Q. Were there any seats to his right?
[fol. 184] A. Yes.
Q. Were they occupied?
A. No.
Q. At no point?
A. No, they weren't.
Q. Are you sure of that?
A. I'm positive.
Q. Was the theatre dark?
A. Yes.
Q. Was there a double feature?
A. Yes; I believe there was, yes.
Q. Did you watch the pictures?
A. Yes; partly.
Q. Do you recall what they were?
A. No.
Q. Who bought the tickets?
A. John Doe—I bought a ticket for John Doe and I entered the movie without paying. They know me at the show.
Q. You mean you badged them?
A. Badged them, yes.
Q. Do you know John Doe by any other name?

Mr. Emanuelson: Your Honor, we are back to the same question.
[Fol. 185] Mr. Walsh: Well, I just want to make the record on it, Judge, so I want to ask the question.
The Court: Are you objecting?
Mr. Emanuelson: I object.
The Court: All right. Objection sustained.

By Mr. Walsh:

Q. Do you know when John Doe died?

Mr. Emanuelson: I object to that question, your Honor.
The Court: Objection sustained.

By Mr. Walsh:

Q. Do you know whether he is dead?

Mr. Emanuelson: I object to that question, your Honor.
The Court: The same ruling.

By Mr. Walsh;

Q. How long did John Doe remain in your company that night?

A. He stayed with us from five o'clock until after the arrest of the Defendant, and he was kept at 11th and State overnight.

Q. Stayed in custody?

A. Yes.

Q. In the prison part of the stations?

A. Yes.

[fol. 186] Q. Was he under arrest?

A. Yes.

Q. By you?

A. Yes. I was one of the arresting officers.

Q. What was the charge against him?

A. He was held on an open charge, an open charge at that time.

Q. What does that mean?

A. Well, it means he has been held open for charges. The State's Attorney places the charges in our office, and we hold people open and make reports to the State's Attorney and he decides what charge.

Q. Well, he did not make any charges against Roviaro, did he?

A. Well, he was charged——

Q. The State's Attorney didn't, did he?

A. He was charged by the State's Attorney, but he was turned over the next morning to the Commissioner of the Bureau of Narcotics.

Q. There was a charge filed by the State against Roviaro?

A. It wasn't filed in Court. There was a charge made.

Q. Well, was there any charge ever filed in any Court as far as John Doe was concerned?

Mr. Emanuelson: Well, your Honor, talking about rele-
[fol. 187] vancy and materiality, John Doe is not at Defendant at this time and I don't think Mr. Walsh represents him.

Mr. Walsh: Well, he is a witness here one way or another.

Mr. Emanuelson: Well, he is a witness because——

Mr. Walsh: I am trying to test his credibility. Just what kind of a character is he?

The Court: Objection sustained.

Mr. Walsh: Your Honor, I do not want to be pesky about it if I can avoid it, but I must persist to this extent, Judge, in stating that we are now in the position of not knowing who John Doe is, whether he is dead or alive, and he is in custody but we do not know whether he is a Defendant in any case.

Now, he obviously told these people some things——

The Court: Well, he may answer the last question. I see no objection to that.

By Mr. Walsh:

Q. Was any charge ever placed against him?

Mr. Emanuelson: He can answer that.

The witness: On his arrest? I don't know. I don't know if any charge was filed in Court. I don't know.

By Mr. Walsh:

[fol. 188] Q. You were one of the arresting officers?

A. Yes.

Q. And you had never been called upon to testify against him?

A. No.

Q. How long after August 12th did you see John Doe again? How much later was it?

A. I don't recall the exact date, but it was shortly after that date.

Q. How many times did you see him after August 12th, 1954.

A. Several.

Q. Well, two or three or twenty?

A. Less than twenty and more than two. I don't know exactly how many.

Q. Can you give us your best estimate?

A. I may have seen him half a dozen times.

Q. When was the last time you saw him?

A. The last time I saw him, I don't remember the exact date, but it was some time—it was around Christmas time, I believe.

Q. Do you know that John Doe is not his correct name?

A. Yes, I do.

Q. Did you appear before the Grand Jury as a witness?

[fol. 189] A. Yes, I did.

Q. Did you tell his correct name to the Grand Jury?

A. No. I don't believe I did.

Mr. Walsh: That is all.

Mr. Emanuelson: That is all.

(Witness excused.)

Mr. Emanuelson: Mr. Fields.

(The witness was thereupon duly sworn.)

James T. Fields, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Emanuelson:

Q. Will you state your name for the record, please, Mr. Fields?

A. James T. Fields.

Q. You are employed by the United States Government?

A. Yes, I am.

Q. In what capacity and what department?

A. Federal Narcotic Agent, assigned to the Chicago Office.

Q. How long have you been so employed?

A. For about thirteen years.

[fol. 190] Q. Do you know the Defendant, Albert Roviaro?

A. Yes, sir, I do.

Q. Do you see him in the Court Room?

A. I do.

Q. Will you point him out, please?

A. He's the gentleman in the grey suit behind Mr. Walsh.

Mr. Emanuelson: Your Honor, may the record show that the witness has identified the Defendant, Albert Roviaro?

The Court: It may so show.

By Mr. Emanuelson:

Q. When was the first time you had an opportunity to see Albert Roviaro?

A. The first time that I saw Roviaro was about June 22nd, 1954.

Q. When was that—I mean, where was that? I am sorry. Where was that?

A. That was in the vicinity of 72nd Street and Indiana Avenue—Michigan Avenue, at night, approximately ten p.m.

Q. Who were you accompanied by, if anyone?

A. I was alone on that occasion.

Q. You were just alone at that time?

A. Yes.

Q. On August 12th, 1954, at approximately five p.m. [fol. 191] o'clock were you employed in your present capacity?

A. Yes.

Q. As a Narcotics Agent of the United States Government?

A. Yes.

Q. What if anything took place at that time?

A. You say about five p.m.?

Q. Yes.

A. I was not present at that particular hour.

Q. Well, at approximately nine p.m. o'clock and thereafter on the same date, did anything take place which you can testify to?

A. About 9:30 p.m. on August 12th, 1954, I was at the corner of 74th and Prairie Avenue. Shortly thereafter a car drove up and parked directly behind me. At that time Agent Durham was seated in another car parked a little ways back behind the second car.

I got out of my car and went over to the second car that

had come up, in which at that time Officer Bryson, Officer Sims and another man were seated.

Q. Who was the other man?

A. The other person was a special employee of the Bureau.

Mr. Emanuelson: Your Honor, so that there will be no [fol. 192] difficulty, may I have permission to ask this witness to identify him as John Doe from here on?

The Court: Yes.

Mr. Emanuelson: Is that all right?

Mr. Walsh: I suggest that you ask who he was, and I will then object. I think we ought to find out.

By Mr. Emanuelson:

Q. Will you continue, Mr. Fields.

A. Agent Durham and I proceeded to search the interior of the car that John Doe was driving.

During this time Officer Bryson and Officer Sims—no—Officer Bryson and Agent Durham, after we searched the interior, went to the rear of the car. I saw Officer Bryson get into the rear compartment of this automobile and shortly thereafter Agent Sims joined me and we left the vicinity and drove——

Q. Now, at that time was there any other search made?

A. Yes, there was. A search was made of the person of John Doe.

Mr. Walsh: By whom?

The Witness: By Officer Sims and Agent Durham.

By Mr. Emanuelson:

Q. Then what happened?

A. After that Officer Sims and I left that locality and [fol. 193] went to the vicinity of 70th and St. Lawrence Avenue.

We parked on St. Lawrence Avenue headed north on the east side of the street where we remained in the car for several minutes.

About 11:05 p.m. a very light colored car, a Pontiac, was observed going north on St. Lawrence. It passed the car

I was in and parked behind the car that had been driven by John Doe.

A man got out of this Pontiac, walked a few feet north and got into the front seat of the car that was driven by John Doe.

There was a second man in the Pontiac. He moved over to the driver's side of the car and turned west on 70th Street and passed from my view.

I proceeded to follow the car that was headed——

Q. Just a minute, please, Mr. Fields.

A. Yes.

Q. May I ask you at the time: Were there any other cars with Government Agents located in this area at this time.?

A. Yes. There was one that I knew was there. The others I don't know the location of, where they were.

Q. Which was the one that you knew was there?

A. That was a car driven by Agent Durham that was [fol. 194] parked on 70th Street just west of St. Lawrence, a few feet back from the stop sign that is at that intersection.

Q. All right.

A. I followed the car driven by John Doe north on St. Lawrence to South Chicago Avenue, where the car made a right-hand turn and proceeded on east to Cottage Grove. I continued following the car to 72nd and Cottage Grove where the car made a right-hand turn into 72nd.

At that time, from the intersection of 71st and Cottage Grove up to 72nd, the car was going very slowly and when they turned into this—when they turned west into 72nd I decided not to follow them around in the same direction, but I continued south on Cottage Grove to 73rd and then west on 73rd Street.

I circled a couple of blocks in the vicinity attempting to locate the other car, and driving around that neighborhood I got near the corner of 74th and St. Lawrence.

I observed the Pontiac that I originally saw at 70th and St. Lawrence parked in the 7400 block of St. Lawrence headed south on the west side of the street.

Not having located the car that was driven by John Doe, I parked near the intersection of 74th and St. Lawrence

on the same side of the street as the other car and [fol. 195] remained there.

A few minutes later I observed the Defendant, Roviaro, approaching the corner of 74th and St. Lawrence, and he walked south on St. Lawrence.

At that time Officer Sims and myself left the car, and as we looked up 74th Street we observed Agent Durham near the car that had been driven by John Doe. He motioned, giving a kind of motion——

Q. What was the motion?

A. Not to—in other words, we were going to approach the Defendant, and he gave a motion not to stop him at that moment, which we didn't. We didn't bother him at that time.

We left the vicinity and went to 69th Street just west of Cottage Grove near Ellis Avenue, where we stopped——

Q. Just a minute, please. When you say "we", who do you mean by "we"?

A. Well, Officer Sims was with me at the time.

Q. I see.

A. Officer Bryson was with John Doe and Agent Durham had followed in his car.

Q. Go ahead.

A. At that point there was a discussion, a conference, [fol. 196] also at which time Agent Durham performed a preliminary field test on the substance of the package that was in his possession.

After that we left there and Agent Sims and myself and John Doe in the car I was driving proceeded to the vicinity of 105th Street and Forest Avenue.

By this time it was a little after midnight. That would be August 13th. The Defendant's car was not located in the neighborhood.

Other localities were visited. I do not know exactly the addresses, because I was following another car. A few minutes later we returned to the address of the Defendant and his car was parked on Forest Avenue in front of the house headed north.

Agent Sims left the car that I was driving. I remained in the car in a position on 105th Street where I could watch the rear of the house.

Sims, Agent Durham and Officer Bryson walked down the street and turned the corner from my view. I remained with John Doe in my car for several minutes until they came out of 10459 South Forest Avenue.

After that, in company with John Doe, Officer Sims rejoined me and we proceeded to the Detective Bureau at 11th and State Street.

[fol. 197] We went to the office of the Narcotics Squad on the 3rd floor, where at that time the packages that had been wrapped in a dark piece of paper were initialled by the Officers.

Q. I show you Government Exhibit 2.

A. Yes.

Q. I ask you if you have ever seen that before.

A. Yes. I have seen this before.

Q. Where did you see that the first time?

A. The first time I saw this piece of paper was at 11th and State Street, the early part of the morning of August 13th.

Q. I show you Government Exhibits 3, 4 and 5.

A. Yes.

Q. And I ask you if you have ever seen those before?

A. I have seen those before.

Q. Where did you see them?

A. I saw these envelopes when they were removed from this piece of paper they were wrapped in at the Detective Bureau at 11th and State the early morning of August 13th.

Q. Do your initials appear thereon?

A. My initials appear thereon, J. T. F.

Q. All right.

[fol. 198] A. My initials appear on each one, and the date underneath there.

Q. Was there any substance in those envelopes?

A. Yes. These envelopes contained a white powder.

Q. What was done with the white powder that was in those envelopes?

A. These envelopes wrapped in this piece of paper was turned over to me by Agent Durham and later that same date of August 13th I transferred the contents out of these Exhibits marked Government Exhibit 4, Government Ex-

hibit 5 and Government Exhibit 3, and I placed the contents into these glassine envelopes here. (indicating.)

Q. Did you then initial them?

A. I did. My initials appear thereon, "J.T.F."

Q. What else appears there?

A. I wrote the word "transferred, 8-13-54."

Q. That appears on Government Exhibits 8, 9 and 10, is that correct?

A. That is correct, sir.

Q. Then what did you do with those Exhibits 8, 9 and 10?

A. The contents of Exhibits 8, 9 and 10 I weighed and sealed the envelopes into this envelope marked [fol. 199] Government Exhibit 6.

Q. When did you do that and where?

A. I did that on August 13th in the offices of the Bureau of Narcotics, 817 New Post Office Building, Chicago, Illinois.

Q. Who else was present, if anyone?

A. Agent Durham was present at that time.

Q. Did you initial the reverse side of Government Exhibit 6?

A. Yes, I did. My initials appear thereon, "J.T.F."

Q. What does that notation say? Will you read that to the Judge, please?

A. "Weighed and sealed, 2 ounces, 389 grains of heorin, August 13, 1954."

Q. In your handwriting?

A. In my handwriting, and my initials, "J.T.F."

Q. Then what was done with Exhibits 8, 9 and 10?

A. Exhibits 8, 9 and 10 were placed in this envelope, Exhibit No. 6, and locked by these metal clasps, and in that sealed condition they were delivered to the U.S. Chemist on the 7th floor of the New Post Office Building.

Q. Then he made his analysis?

A. He made an analysis of the substance that was [fol. 200] contained in these three envelopes.

Mr. Emanuelson: That is already stipulated to, so I do not need to put this in.

By Mr. Emanuelson:

Q. Do you know what the U.S. Chemist did with it? What did he do with it after he finished his analysis?

A. The evidence remained in the custody of the chemist from the date I delivered it until it was brought into Court for trial.

Q. That was the last time you saw it there?

A. That was the last time I saw it.

Q. On the front of Government Exhibit 6 it says, "Treasury Department, Bureau of Narcotics", and has a case number and several other matters. Where do you obtain that information from?

A. This information that is written on the face of the envelope?

Q. Yes.

A. It is obtained from what you actually know about the evidence itself, and sometimes from some other agent or Officer that was present at the scene.

Q. Is that the official Government report?

A. It is not, no.

Mr. Emanuelson: I see. All right. That will be all [fol. 201] for the Government.

Cross Examination.

By Mr. Walsh:

Q. What is the official Government report?

A. Well, there are a number of official Government reports. What do you have reference to?

Q. Well, counsel asked you if this was the official Government report (indicating), and he was referring to Government Exhibit 6. This certainly is part of an official Government report, isn't it?

A. Yes, it is. This is the official envelope that we identified as the evidence envelope that the evidence is in and sealed.

Q. Who told you that this material enclosed in this envelope was found by Officer James Bryson at 74th and St. Lawrence?

A. I think Agent Durham gave me that information at that time, later that same day, on August 13th.

Q. All right. You had been in conference with Bryson, Durham and Sims and John Doe from the time that you left 74th and St. Lawrence until you got back to 11th and State, hadn't you, more or less, except for the times you were separated in automombiles?

A. Yes. We did discuss matters.

[fol. 202] Q. Now, this field test—where was that made?

A. That was made on 79th Street west of Cottage Grove near Ellis Avenue.

Q. I think you said 69th before, and all the others did.

A. 69th; that is correct.

Q. What is located there?

A. Nothing is actually located there. On the south side of the street it is vacant; there are no homes. On the north side of the street there are just small homes.

Q. Well, what is the nature of this field test that was made?

A. It's a small vial, very narrow, that contains a solution that we identify as a narcotic reagent, and when a very small amount of any narcotic is placed in this solution, the solution turns to a dark purple in color which indicates that there could be a derivative of opium in the substance.

Q. Will any other substance turn it purple beside opium, as far as you know?

A. As far as I know, I don't know of any other substance.

Q. Well, do you know that there is no other?

[fol. 203] A. I could not say that.

Q. I see. You did not see the recovery of this material?

A. No, I didn't.

Q. Did you appear as a witness before the Grand Jury in this case?

A. I don't think I did.

Q. I note that you say, "Amount paid, none". Did you know that of your own knowledge, or was that reported to you by another agent or officer?

A. That was reported to me, that during this transaction there was no money paid.

Q. Nothing was paid?

A. No.

Q. Now, did you take part in searching the home of the Defendant——

A. I did not.
Q. —at the time of his arrest?
A. No.
Q. There was such a search made, though?
A. I would not know, of my own knowledge. I understand there was.
Q. Did you watch the other Officers go through his house?
[fol. 204] A. I did not.
Q. You remained——
A. I remained outside in the car with John Doe.
Q. You stated that the first experience you had with this transaction was about 9:30 the night of August 12th?
A. Yes, it was.
Q. At that time you saw Officers Sims and Bryson—those are Chicago Policemen?
A. Yes, they are.
Q. (Continuing)—appear in this Cadillac?
A. Yes.
Q. Who was driving it?
A. Officer Sims was driving it—no. Officer Bryson was driving the car.
Q. And who was with him?
A. Officer Sims and John Doe.
Q. Do you know John Doe by any other name?

Mr. Emanuelson: Your Honor, I object to that question.
The Court: Objection sustained.

By Mr. Walsh:

Q. Did you know him by any other name at that time?

Mr. Emanuelson: I object to that question.
A. I did not.

[fol. 205] By Mr. Walsh:

Q. Do you know whether he is alive?

Mr. Emanuelson: Your Honor, I object to that question.
The Court: Objection sustained.

By Mr. Walsh:

Q. Do know when he died?

Mr. Emanuelson: I object to that question without any foundation being laid for it.

The Court: Objection sustained.

By Mr. Walsh:

Q. Did you see him after August 12th?
A. I saw him on August 13th.
Q. Did you see him in September?
A. No, I didn't.
Q. Or in Ooctober?
A. No, sir.
Q. Or November?
A. No, I didn't.
Q. Evet after the 13th?
A. Not after August 13th.

Mr. Walsh: That is all.

Mr. Emanuelson: Wait a minute. Are you through?

Mr. Walsh: Yes—just a minute.

[fol. 206] By Mr. Walsh:

Q. What other documents were you referring to when you said that this was not the official Government report?

A. Well, we consider the official report as the written report that is prepared after the conclusion of an investigation.

Q. I see. Now, are there other reports written by Agent Durham with regard to this transaction, to your knowledge?

A. Yes. There are other reports written.

Q. Do you know whether they coincide with his statement to you that this material was found by Officer Bryson at 74th and St. Lawrence?

A. That I would not know.

Mr. Walsh: May I see those statements, counsel, Officer Durham's written statements?

Mr. Emanuelson: I do not have them. You mean this (indicating)?

Mr. Walsh: No.

Mr. Emanuelson: I do not have any written statement with me here, sir. If there are any, could we bring those in tomorrow morning?

The Court: We are going to conclude this case today, [fol. 207] gentlemen.

Mr. Walsh: I would like to point out, your Honor, that in the case of the United States vs. Gordon, a question very similar to this occurred.

We now have a witness who has testified, and he is now to some extent in disagreement with this witness. This witness says he was told by Agent Durham that Officer Bryson found the material at 74th and St. Lawrence.

I want to know now whether there is any statement contradicting this one that was written by Agent Durham, any statement that may contradict his testimony. I think we have a right to see that statement.

Mr. Emanuelson: I think that witness——

The Court: You have the witnesses here present in person. Aren't they the best evidence?

Mr. Walsh: Well, they are the best evidence, except this: If a witness ever made a statement in writing that contradicts his testimony here, that is of importance to your Honor in determining the value of his present testimony.

Mr. Emanuelson: You are back to the——

Mr. Walsh: We have that situation exactly here present so far, and I would like to see how much further we can [fol. 208] develop it.

Mr. Emanuelson: I am sure that the Court is aware that Government Agents are presumed to be doing their duty at all times.

If there is a clerical error, that is not important, and I cannot see yet where the testimony in fact has been at any variance.

We have not said and no testimony has been presented which is directed to show that James Bryson was the sole person who was the eye-witness. We say that Mr. Bryson and Mr. Durham both saw it.

The Court: You may proceed with the examination of the witness.

Mr. Walsh: Well, I would like to persist in my request for the production of the document.

Mr. Emanuelson: Well, I do not think they are material. If defense counsel can show some basis for this other than the fact it might be a clerical mistake, if he would show that there was testimony saying that someone said that Bryson found it, Bryson only, himself, found it and Durham didn't see it, that would be a different situation, but that is not the testimony before the Court.

Mr. Walsh: We now have the testimony of the witness [fol. 209] on the stand to the effect that he was given information to the effect that Bryson found it at 74th and St. Lawrence.

Mr. Emanuelson: That is right, and it is not wholly untrue, because you could construe it to be found by both.

The Court: The objection is sustained. Proceed.

Mr. Walsh: Do I understand that I cannot obtain the production of that document, that the Government's refusal to produce it will be sustained?

Mr. Emanuelson: Well, your Honor, all these things were available to counsel under Rule 16 before we started.

Mr. Walsh: I did not have this man's testimony before we started.

The Court Objection sustained. You are objecting, is that it?

Mr. Emanuelson: Yes, I am.

The Court: All right. Objection sustained.

Mr. Walsh: So it will be clear, Judge, I am asking for the production of the document for inspection, that is, any statements made by Mr. Durham.

Mr. Emanuelson: Well, your Honor, he cross examined the witness, who saw the Defendant——

[fol. 210] The Court: I have ruled, gentlemen.

Mr. Walsh: That is all.

Mr. Emanuelson: Just one more thing. Mr. Reporter, will you mark this as Government Exhibit 17 for identification, please.

(The document was thereupon marked Government Exhibit 17, for identification.)

Redirect Examination.

By Mr. Emanuelson:

Q. I show you Government Exhibit 17 for identification and ask you if you have ever seen that before?

A. Yes. I have seen this before.

Q. Can you tell the Court what it purports to be?

A. This is a form that is prepared on evidence that is submitted to the U. S. Chemist for analysis.

This is one of the copies of such form that I prepared and signed along with the signature of the supervisor, and submitted to the U. S. Chemist along with the evidence.

Q. Now, can you tell the Court whether or not it appears thereon as to who or what person found the alleged narcotics? That is not on that report, is it?

A. That is not on this report.

[fol. 211] Q. All this does is to show that this was submitted, a certain purported quantity of narcotics, to the United States Chemist? Is that right?

A. That is correct.

Q. Then he makes his analysis?

A. Then he makes his analysis and returns copies of this report with notations down where it says, "Remarks" as to his findings after analysis.

Q. Now, all of these things you have testified to occurred in Chicago, Illinois within this District, is that right, sir?

A. They did.

Mr. Emanuelson: That is all.

Mr. Walsh: That is all.

(Witness excused.)

Mr. Emanuelson: Your Honor, we have another witness who could testify as an expert from the Cadillac Motor Car Division of General Motors as to the construction of the automobile.

However, I do not think it is necessary, and I do not want to take the Court's time. I think there is enough evidence to permit the Court to dispose of this case and that we would just be wasting your time by calling this

other witness, so the Government will rest on the evi-
[fol. 212] dence presented.

The Government here rested its case in chief.

[fol. 213] Mr. Walsh: I understand your Honor to mean that both sides should conclude tonight?

The Court: We will proceed for a while, at least, gentlemen. I do not want to deprive anyone of the opportunity to be fully heard.

Mr. Walsh: Well, I would like a few minutes to confer with my client. I have a motion to make at the close of the Government's case. I wish to move for a judgment of acquittal.

The Court: All right. We will take a short recess so you may confer with your client.

(Whereupon a short recess was taken, after which the following further proceedings were had herein, to-wit:)

The Court: You may proceed.

Motion for Judgment of Acquittal and Denial Thereof.

Mr. Walsh: May it please your Honor, the Defendant now moves for a judgment of acquittal at the close of the Government's evidence.

(Counsel for the Defendant and counsel for the Government thereupon made oral arguments to the Court.)

The Court: The motion of the Defendant for a judgment of acquittal as to the Counts of the Indictment will be denied. That motion is at the close of the
[fol. 214] Government's case.

Mr. Walsh: That is right, your Honor.

The Court: Are you prepared to proceed?

Mr. Walsh: I think we will call no witnesses, your Honor. We will rest.

Mr. Emanuelson: My argument would be the same.

The Court: You renew your motion, I take it?

Mr. Walsh: Yes.

The Court: I am going to continue the matter for final disposition until next Monday morning. If either side has any cases they want me to look at in the meantime, I will be glad to do that. Otherwise the matter will be finally disposed of next Monday morning.

(Which were all of the proceedings had, testimony taken and evidence offered at the trial of the above-entitled cause.)

[fol. 215] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 216] GOVERNMENT'S EXHIBIT 6

TREASURY DEPARTMENT

Bureau of Narcotics

District 9 Case No. 111-7200

Name: Albert Roviaro, Alias "Chick."

Address: 10459 Forest Ave., Chicago, Illinois.

Evidence: 2 oz., 389 grs. Heroin contained in 3 glassine envelopes (not original containers). Retained for finger-print development.

How Obtained, Found by Officer James L. Bryson.

Where Obtained: 74th & St. Lawrence Ave., Chicago, Illinois.

Date: August 12, 1954.

Time: 11:15 P.M.

Amount paid, $ None.

Witnesses: J. T. Fields, N. M. Durham, J. L. Bryson, G. T. Sims.

Agent reporting case: Norris M. Durham.

Remarks: Ex #1, weighed and sealed by Agent J. T. Fields, in the presence of Agent Durham, and delivered to the U. S. Chemist, Chicago, Ill., for analysis.

Filed 54 CR 511 Nov. 23, 1955, at —— o'clock ——. G. B. Roy H. Johnson, Clerk.

Weighed and Sealed: 2 oz. 389 grs. Heroin, Aug. 13, 1954, By: J. T. F.

Witnessed: 8/13/54, N. M. D.

[fol. 217] UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 54 CR 511

UNITED STATES OF AMERICA

v.

ALBERT ROVIARO

JUDGMENT AND COMMITMENT—October 17, 1955

On this 17th day of October, 1955 came the attorney for the government and the defendant appeared in person and by his counsel and the Court being fully advised in the premises it is

Ordered that the defendant's motion for judgment of acquittal made at the close of all the evidence be and the same is hereby denied and the Court being now fully advised finds the defendant guilty as charged in the Indictment.

It is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of Section 2554(a), Title 26, U. S. C. Section 174, Title 21, U. S. C. (Unlawful sale and concealment after importation of heroin and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years and besides that he forfeit and pay to the United States of America a fine in the sum of Five Dollars ($5.00) on each of Counts 1 and 2 of the Indictment, that said sentences shall run concurrently and the defendant to stand committed until the fine is paid or until he shall be otherwise discharged by due course of law.

On motion of the defendant it is

Ordered that execution of sentence be and the same is

hereby stayed until October 24, 1955 at 2 P.M. at which time the defendant shall surrender to the United States Marshal and it is

Further Ordered, that bond of the defendant heretofore filed herein shall stand as staybond.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Wm G. Knoch, United States District Judge.

The Court recommends commitment to:
October 17, 1955.

[fol. 218] In the United States District Court for the Northern District of Illinois, Eastern Division

[Title omitted]

Motion for New Trial—Filed October 19, 1955

The defendant, Albert Roviaro, by his attorney, Maurice J. Walsh, moves the Court for a New Trial on the following grounds:

1. The Court erred in denying the defendant's Motion for Particulars as to the identity of "John Doe", referred to in the indictment.

2. The Court erred in sustaining objections of the prosecution to cross-examination as to the identity of "John Doe", and as to whether he was dead or alive at the time of trial.

3. The Court erred in sustaining the Government's refusal to disclose the identity of "John Doe"; although he was not a mere informer, but was a person, whom the indictment and evidence clearly showed to be an active participant in the transactions prosecuted.

Sorrentino vs. *United States* (9 Cir.) 163 F. 2nd 627
United States vs. *Conforti*, (7 Cir.) 200 F. 2nd 365
Portomene vs. *United States*, (5 Cir.) 221 F. 2nd 582

4. The Court erred in admitting, over objection, the testimony of Police Officer Bryson relating conversation which [fol. 219] he claimed to have heard in an automobile between persons whom he did not identify, other than by inference.

5. The Court erred in admission of alleged conversations between the defendant and Agent Durham and Officer Bryson after defendant's arrest, and in not thereupon admitting all of such conversation on cross-examination.

6. The evidence is not sufficient to sustain conviction because:

a. It was not clear, concise and convincing beyond reasonable doubt.

b. Knowing commission of the offense was not proved.

c. The evidence to establish possession was incomplete.

Respectfully, (S.) Maurice J. Walsh, Attorney for Defendant, Albert Roviaro.

[fol. 220] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ORDER DENYING MOTION FOR NEW TRIAL—October 19, 1955

This day comes the United States by the United States Attorney comes also the defendant Albert Roviaro in his own proper person and by his counsel and enters herein his motion for a new trial and the Court being fully advised it is

Ordered that said motion be and the same is hereby denied and it is

Further ordered that bond on appeal be and the same is hereby set in the amount of Ten Thousand Dollars ($10,000.00).

[fol. 221] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL—Filed October 19, 1955

Name and Address of Appellant: Albert Roviaro, 10459 South Forest Avenue, Chicago, Illinois.

Name and Address of Appellant's Attorney: Maurice J. Walsh, 2212 Bankers Building, 105 West Adams Street, Chicago, Illinois.

Service of motions or notice should be made upon Maurice J. Walsh, 2212 Bankers Building, 105 West Adams Street, Chicago, Illinois.

Offense: Unlawful sale of narcotics (Section 2554(a), Title 26, U.S.C.); and unlawful receipt and facilitation of narcotic drugs (Section 174, Title 21, U.S.C.).

Concise statement of judgment or order, giving date, and any sentence:

Finding of guilty by Court without jury and judgment and sentence thereon on October 17, 1955.

The defendant was sentenced to the Custody of the Attorney General for a period of two years, and a fine of $5.00 on Count I and also on Count II, the sentence to be served concurrently.

[fol. 222] Name of institution where now confined, if not on bail:

The defendant is at large upon bail in the sum of $8,000.00 and execution of the sentence has been stayed until 2:00 P.M. on October 24, 1955.

I, Albert Roviaro, the Appellant, by my attorney, Maurice J. Walsh, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the above-stated judgment.

Dated: October 19, 1955.

Maurice J. Walsh, Attorney for Albert Roviaro, Appellant.

[fol. 223] CERTIFICATE OF MAILING (omitted in printing)

[fol. 224] BOND

Know all Men by these Presents, That Albert Roviaro (54 CR 511) State of Illinois as principal, and United Pacific Insurance Co. by William Markheim, Attorney-in-fact, 2647 Summerdale Ave., Chicago, Illinois, State of Illinois, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Ten-thousand Dollars ($10,000.00), to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this —— day of October ——, In the Year of our Lord, One thousand Nine Hundred and Fifty-five.

Whereas, lately on the 19th day of October, 1955, at the October Term of the United States District Court for the Northern District of Illinois, Eastern Division, in a cause pending in said Court between the United States of America, Plaintiff, and Albert Roviaro, Defendant, a judgment and sentence were rendered against said Albert Roviaro and the said Albert Roviaro having filed in the office of the Clerk of said United States District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit from the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and whereas said appeal is to operate as a supersedeas upon filing of this bond.

Now the condition of said obligation is such, That if the said Albert Roviaro shall appear in person in the United States Court of Appeals for the Seventh Circuit on the —— day of ——, A.D., 19 ——, of the October Term 1955, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the United States Court of Appeals for the Seventh Circuit, in said

cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed and if he shall appear for trial in the United States District Court for the Northern District of Illinois, Eastern Division, on such day or days as may be appointed for retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Court of Appeals for the Seventh Circuit, then the above obligation to be void; otherwise to remain in full force, virtue, and effect.

And in the event that default be made in the condition of this writing obligatory as herein provided, it shall be lawful for and the undersigned irrevocably authorize and empower the United States Attorney of said District, whoever he may be, or any Assistant United States Attorney of said District, or any Attorney authorized to appear in the United States District Court of said District, to appear for us in the said United States District Court at any time thereafter and confess a judgment in the amount of this obligation, together with costs, in favor of the United States of America and against the undersigned, without process and without a trial by jury, the undersigned hereby waiving the right of a trial by jury, and we do hereby waive and release all errors which may intervene in any such proceedings, and consent to the immediate issuance of execution upon said judgment, and we do hereby ratify and confirm all that said attorney may do by virtue hereof.

If this bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the United States District Court for the Northern District of Illinois, Eastern Division against each of the undersigned jointly and severally for the amount above stated together with interests and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

United Pacific Insurance Co. By: Wm. Markheim, Attorney-in-fact, Albert Roviaro. (Seal)

Signed and acknowledged before me this 20th day of October, 1955, James F. Kuchta, Deputy Clerk.

Approved; Oct. 20, 1955.

Win G. Knoch, United States District Judge.

Approved: J. E. Tobin, Asst. U. S. Attorney.

(Power of attorney attached but not copied):

[fol. 225] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

STATEMENT REQUIRED UNDER RULE 10(c) OF THE RULES OF THE COURT OF APPEALS FOR THE 7TH CIRCUIT—Filed October 26, 1955

The name of the appellee is: United States of America. The names and addresses of its counsel are: R. Tieken, United States Attorney, John Peter Lulinski, Assistant U. S. Attorney, Anna R. Lavin, Assistant U. S. Attorney, 450 United States Court House, Chicago 4, Illinois.

R. Tieken, United States Attorney.

[fol. 226] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DESIGNATION OF RECORD—Filed November 4, 1955

To: The Clerk of the United States District Court, Northern District of Illinois, Eastern Division:

You are hereby requested to make a transcript of record to be filed in the United States Court of Appeals for the Seventh Circuit, pursuant to appeal taken in the above-entitled cause, and to include in such transcript of record the following designated items:

1. Indictment filed September 3, 1954.
2. Plea of not guilty.

3. Motion for Bill of Particulars filed December 17, 1954.

4. Order denying Motion for Bill of Particulars entered January 7, 1955.

5. Transcript of trial proceedings June 13, 1955.

[fol. 227] 6. Orders of October 17, 1955.

a. Denying Motion for acquittal at close of all evidence.

b. Finding of guilty and Judgment thereon.

c. Sentence two years and $5.00 fine.

7. Motion for New Trial filed October 19, 1955.

8. Order denying Motion for New Trial October 19, 1955.

9. Notice of Appeal filed October 19, 1955.

10. Order setting bond pending appeal at $10,000.00 filed October 19, 1955.

11. Government Exhibit No. 6, received in evidence.

It is further requested that such other items as are usually and necessarily prepared, as required by law and rules of the Court, be prepared, and that the transcript of the record include the testimony of the witnesses at the trial in this cause, and all other matters arising during the trial, excepts exhibits not referred to above.

Said transcript is to be prepared, as required by law and the rules of the Court, and the Federal Rules of Criminal Procedure, and is to be filed in the Office of the Clerk, in the Court of Appeals, at 1212 Lake Shore Drive, Chicago, Illinois, within the time prescribed by law, unless the time is enlarged and extended by Order of Court.

Maurice J. Walsh, Attorney for Defendant, Albert Roviaro.

[fol. 228] Received a copy of the foregoing Designation of Record this 4th day of November, 1955.

R. Tieken, By E. Tillotson, United States Attorney.

[fol. 229] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ORDER RE EXHIBIT AND RECORD—November 22, 1955

This cause coming on to be heard by agreement of the parties for facilitation in transmitting the record on Appeal, by agreement,

It is Ordered that the original of Government Exhibit No. 6 be certified and transmitted as part of the record by the Clerk of this Court to the Clerk of the United States Court of Appeals for the Seventh Circuit.

It is further Ordered that the Clerk be excused from comparing the copy of the stenographic record, filed by the defendant, and certified by the Official Reporter, with the copy filed by the Official Reporter, it appearing that one is an exact carbon copy of the other, made at the same time and both certified by the Official Reporter.

Enter: Win G. Knoch, Judge.

Approved: T. Tieken, U. S. Attorney, J. P. L., Ass't. U. S. Attorney.

Dated: November 22, 1955.

[fol. 230] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 231] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1955, JANUARY SESSION, 1956

No. 14616

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

ALBERT ROVIARO, Defendant-Appellant

OPINION—February 7, 1956

Before FINNEGAN, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

LINDLEY, *Circuit Judge.* In a trial before the court without a jury, defendant was found guilty upon the two counts of an indictment charging that he (1) on August 12, 1954, sold to one John Doe heroin in violation of 26 U. S. C. § 2554 (a), and (2) on the same date, in the city of Chicago, knowingly received, concealed and facilitated the transportation, after importation, of heroin in violation of 21 U. S. C. § 174. The court entered a general sentence, ordering defendant imprisoned for two years and fined.

Upon appeal, defendant asserts error in that the court (1) denied his petition for a bill of particulars disclosing the home address and occupation of John Doe; (2) unduly limited the cross-examination concerning the identity of the said Doe; and (3) wrongfully denied his request for production of a report of Narcotic Agent Durham.

In support of the first two alleged errors defendant urges that, inasmuch as Count I charged sale of narcotics by defendant to John Doe, the latter became more than a mere informer but an active participant in the transac- [fol. 232] tion, as the purchaser of the contraband goods. He recognizes the rule that if the person named is only "an informer and nothing more" defendant is not entitled to have his identity disclosed; but he insists that, where the so-called informer is an active participant in the illegal transaction, the defendant is entitled to full disclosure of

the identity of the participant, and cites in support of his argument, *Sorrentino* v. *United States*, 163 F. 2nd 627 (CA—9); *United States* v. *Conforti*, 200 F. 2d 365 (CA—7); *Portomene* v. *United States*, 221 F. 2d 582 (CA—5). However, in view of our conclusions, we find it unnecessary to decide whether the facts at bar bring the case within the authorities cited, inasmuch as it is undisputed that John Doe was not a participant in defendant's illegal possession charged in Count II. This we think will be clear from a brief review of the undisputed evidence.

Both Agent Durham and Police Officer Bryson witnessed the transactions involved in the charges of Count II, Officer Bryson from the trunk of a Cadillac automobile where he was concealed, and Agent Durham from a point a short distance away from defendant. Each saw defendant go to a certain tree, pick up a package, and carry it to the Cadillac. This package, when analyzed, was found to contain heroin. John Doe had nothing to do with defendant's illegal possession or carriage of the package; he was not a participant in any sense of the word, in defendant's procurement and transportation of the package. Proof of his identity would not have shed any light at all upon the undisputed, illegal acts of defendants, *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (CA—2), for the latter's possession and carriage of the package alone furnished *prima facie* evidence of guilt under Count II and left him with the burden to prove that he possessed the narcotics lawfully. *United States* v. *Li Fat Tong*, 152 F. 2d 650, at 652, and cases there cited. Indeed, such is the express provision of 21 U. S. C. § 174. See *United States* v. *White, et al.*, — —F. 2d —— (CA—7), (No. 11516 decided January 6, 1956), and cases there cited. It follows, then, that since the evidence of guilt upon Count II is undisputed, and under it, John Doe was in no wise implicated with the illegal possession of defendant, any question of his identity is wholly immaterial on this charge.

It follows also that, inasmuch as the sentence was general and guilt under Count II is sufficient to support the [fol. 233] sentence, it is, as we have pointed out, immaterial as to whether error intervened as to Count I, for it has long been established that if a sentence does not exceed

that which may lawfully be imposed under any single count, the judgment must be affirmed, if the evidence is sufficient to sustain any one of the counts. *Abrams* v. *United States*, 250 U. S. 616; *Sinclair* v. *United States*, 279 U. S. 263, at 299; *Brooks* v. *United States*, 267 U. S. 432, at 441; *United States* v. *Iacullo*, 226 F. 2d 788, 795-796 (CA—7).

We have remaining the question of whether the trial court committed prejudicial error in refusing defendant's request for production of Agent Durham's alleged written report to the Narcotics Division. This question arose upon defendant's cross-examination of Durham, who testified that he found the package of contraband wares picked up by defendant and deposited by him in the automobile. The captured narcotics were, for safe-keeping, preserved in a sealed manila envelope, which was produced and introduced in evidence. It bore a label in Agent Field's handwriting, stating that the narcotics had been "found by Officer Jas. L. Bryson," and was witnessed by Agents Field and Durham and Officers Bryson and Sims. This label, of course, was not evidence; it was added, after the event, merely for purposes of identification.

To our minds, it was wholly immaterial as to who found the package. The sworn testimony of Bryson and Durham is not at variance. The two searched the automobile before defendant deposited the package therein. Bryson sat in the trunk, the lid of which was propped partly ajar. After the car was parked, defendant appeared in his Pontiac. He then got in the automobile in which Bryson was concealed, which was then driven to the place where the violation was observed. There Durham saw defendant get out of the car, leaving the door open, proceed a short distance to a tree, stoop down, pick up a package, take it to the automobile, and place it therein. When he left, Durham walked to the car and there saw the package and picked it up. He wrapped it in a handkerchief and gave it to Officer Bryson who delivered it to the chemist. Bryson testified that he lifted the trunk lid slightly, and observed defendant go to the tree, pick up the package, return to the car, and then depart. He testified that Durham then reported to him that he could come out, and that

he emerged and saw that Durham had the package in his [fol. 234] hand. Later he witnessed the label on the envelope with the other agents and officers. Thus, it appears undisputed that both Durham and Bryson saw defendant pick up the package, which proved to be heroin. Both saw him carry it to the car where Bryson was concealed. Both saw him in sole possession of the narcotics. Both participated in their preservation. In this situation, we think it wholly unimportant and immaterial as to whether Field noted on the envelope that the narcotics were found by Bryson or whether the others so indicated. The envelope was employed to keep the narcotics safely, not to supply evidence as to which officer first saw defendant in possession. Inasmuch as the label was wholly immaterial, of course, to compel a report to be produced, merely because it was asserted that in some way is might possibly contradict an immaterial matter, would have been improper.

Furthermore, as the Supreme Court said in *Goldman* v. *United States*, 316 U. S. 129, 132: "We think it is the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. * * * a large discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case." See also *United States* v. *Lightfoot*, —— F. 2d ——, (CA—7), (No. 11470, decided January 12, 1956) and other cases there cited.

Then, too, we think there was no sufficient showing of the materiality of the report. In *United States* v. *Bookie, et al*, —— F. 2d —— (CA—7), (No. 11498, decided January 12, 1956), we had occasion to consider a similar situation. There defendant, in the course of the trial, made a demand for production of a report of the arresting officers to their superiors. This the court denied. We held that such action did not constitute prejudicial error, for the reason that there was no showing that the report contained evidence material or relevant to the issues in the cause, citing *United States* v. *Chichester Chemical Co.*, 298 Fed. 829 (CA—DC), and *Moffatt* v. *United States*, 232 Fed. 522 (CA—8). We remarked that nothing in the Acts of Congress or the Rules of Criminal Procedure requires "a court

to permit such a fishing expedition in the course of a trial." So here the witness had not made use of or relied upon the report. Defendant made no showing that anything therein was in conflict with the witness' testimony [fol. 235] or that the document contained anything material or relevant to the cause. Consequently, it was well within the discretion of the trial court to deny the demand. Nothing in *Gordon* v. *United States*, 344 U. S. 414, conflicts with this conclusion, for there, as the court pointed out at page 418, adequate showing had been made that the document contained evidence material and relevant to the issues on trial.

For the reasons stated, the judgment is

Affirmed.

A true Copy:

Teste: Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit. (Seal.)

[fol. 236] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11616

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

ALBERT ROVIARO, Defendant-Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT—February 7, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

[fol. 237] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—March 7, 1956

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

[fol. 238] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 239] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 21, 1956

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 6 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 8758

ALBERT ROVIARO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAURICE J. WALSH,
105 West Adams Street,
Chicago 3, Illinois,
Attorney for Petitioner.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinions below	1, 1a-5a
Jurisdiction	2
Questions presented	2
Statement	4
Reasons for Granting Writ	13
Conclusion	28

CITATIONS.

CASES:

Asgill v. United States, (C.A. 4) 60 F. 2d 776	23
Bollenbach v. United States, 326 U.S. 607, 614	27
Casey v. United States, 276 U.S. 413, 72 L. Ed. 632	28
Gordon v. United States, 344 U.S. 414	14, 23, 24
People v. Bachman, 41 Nev. 197, 168 P. 733	23
People v. Davis, 52 Mich. 569, 18 N.W. 362	23
People v. Schainuk, 286 N.Y. 161, 164, 36 N.E. 422	23
Portomene v United States, (C.A. 5) 221 F. 2d 582	14, 19, 21
Scanlon v. United States, 223 F. 2d 382, 392	17
Sorrentino v. United States, (C.A. 9) 163 F. 2d 627	18
United States v. Andolschek, 142 F. 2d 503, 506	24
United States v. Carll, 105 U.S. 611, 26 L. Ed. 1135	24
United States v. Conforti, (C.A. 7) 200 F. 2d 365	19

PAGE

United States v. Coplon, 185 F. 2d 629, 638 24

United States v. Di Re, 332 U.S. 581, 593 26

United States v. Krulewitch, (C.A. 2) 145 F. 2d 76, 79 23

United States v. Wainer, 170 F. 2d 603 26

Tot v. United States, 319 U.S. 463, 469 .....26, 27, 28

Yee Hem v. United States, 268 U.S. 178, 69 L. Ed. 904 28

STATUTES:

Sec. 2554(a), Title 26, U.S.C. 14

Sec. 174, Title 21, U.S.C. 14, 24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No.

ALBERT ROVIARO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Albert Roviaro, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on October 17, 1955, and is not reported but appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith. The record was not printed for use of the Court of Appeals, but was considered on the typewritten stenographic transcript and certified record of the trial Court.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed November 7, 1955, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the Record.

JURISDICTION.

On March 7, 1956, it was ordered that the petition for rehearing be denied. (These orders appear in the Appendix.) This petition is filed within 30 days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) 62 Stat. 928.

QUESTIONS PRESENTED.

1. Was it reversible error to conceal and hide from the defendant the true identity of an informer and active principal participant in the acts complained of, who was described in the indictment and referred to by Government witnesses throughout the trial as "John Doe", although these witnesses admitted knowledge of "John Doe's" true identity? And where this concealment of identity of an active principal participant was accomplished by denial of a prompt request for particulars, and by complete and arbitrary denial of the right to cross-examine Government witnesses on the point, was not the defendant deprived of information as to the nature and cause of the accusation, and of a fair trial and due process of law?

2. Did the refusal to disclose the identity of "John Doe" an informer and active participant in the matters prosecuted, and failure to produce him as a witness, when the record indicated he was a favorable witness to the defendant, (Tr. 154) infringe upon and effectively

destroy the accused's right to have compulsory process for obtaining witnesses in his favor?

3. Where it appeared from written entries upon a Government exhibit, and by testimony of a Government witness who made the entries, that a prior Government Agent witness had made oral statements contrary to his testimony on a crucial item of evidence, was it error to refuse a request for inspection of existing written statements of the Government Agent on this point?

4. Where a statute (174 T. 26 U.S.C.) provides that "Whoever *fraudulently* or *knowingly* imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, *knowing* the same to have been imported contrary to law," shall be punished; and further that "Whenever on trial for a violation of this subdivision the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury"; and the indictment charges that, "defendant herein, did then and there *fraudulently* and *knowingly* receive, conceal, buy and facilitate the transportation after importation of a quantity of a certain narcotic drug, . . . *knowing* the same to be imported into the United States contrary to law" (Emphasis supplied); can evidence of fleeting and inferential possession of a package for a matter of seconds, *without any proof of knowledge* of existence of narcotics therein, or fraudulent purpose, by defendant, trigger into effect the statutory provision that possession shall be sufficient evidence to

authorize conviction, in a case where the defendant offers no evidence but relies on a motion for acquittal at the close of the Government's evidence?

5. Is it necessary for the Government's evidence to support or establish the inference of knowing or conscious possession of narcotics, before the burden of proof, or "burden of proceeding", shifts to the defendant and requires him to explain possession to the satisfaction of the Jury, in a prosecution for knowing and fraudulent possession of narcotics, knowing them to be imported contrary to law, in violation of Section 174, Title 21, U.S.C.A.?

STATEMENT OF THE CASE.

The petitioner was convicted of violation of Section 2554(a), Title 26, U.S.C. and of Section 174, Title 21, U.S.C. in a trial by the Court, without a jury. The trial commenced on June 13, 1955, and all evidence was completed on that day. The Court took the matter under advisement and authorized the filing of briefs. On October 17, 1955, the petitioner's motion for judgment of acquittal at the close of the evidence was denied and the Court entered a judgment of guilty on the two counts of the indictment and sentenced the defendant to two years imprisonment and to payment of a fine of $5.00 on each count, the sentences to imprisonment to run concurrently.

On October 19, 1955, the trial Court overruled the petitioner's motion for new trial and fixed bond on appeal in the sum of $10,000.00, which bond was filed with the Clerk of the District Court.

Count I charges that the petitioner, Albert Roviaro, did on August 12, 1954, at Chicago, Illinois, sell to "John Doe" for a consideration, unknown to the Grand Jurors, a quantity of narcotics, not in pursuance of a written

order from the said "John Doe" on a form issued by the Secretary of the Treasury; in violation of Section 2554(a), Title 26, U.S.C.

Count II charges that the petitioner, Albert Roviaro, on August 12, 1954, at Chicago, Illinois, did then and there fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation a quantity of a narcotic drug, knowing the same to be imported into the United States contrary to law; in violation of Section 174, Title 21, U.S.C.

The petitioner filed a Motion for Bill of Particulars which asked for the following information:

1. What is the name, address and occupation of the alleged purchaser described as "John Doe" in Count I of the Indictment?

2. On what date and at what time on said date did the alleged offense occur?

3. At what place, by street and number, did the offense or offenses charged in the Indictment occur?

The Prosecutor vigorously opposed this request for particulars, contending that "John Doe" was a mere informer and that secrecy as to his name and identity was important to the United States, and that the Government should not be required to disclose his identity.

The Court denied the Motion for the Bill of Particulars in all respects.

EVIDENCE.

The evidence consisted of the testimony of four Government witnesses; Agent Norris M. Durham of the Federal Narcotics Bureau (Tr. 3-133); Chicago Police Officer Bryson (Tr. 133-170); Chicago Police Officer Sims (Tr. 170-189), and Federal Narcotics Agent Fields (Tr. 189-212).

Agent Durham described two meetings between the four Government witnesses and an individual described as "John Doe" on August 12, 1954, at 75th and Prairie Avenue in Chicago, Illinois (Tr. 5, 6). He stated that after the second of these meetings, which was at about 9:30 P.M., Detective Bryson climbed into the trunk of a Cadillac sedan which was owned and driven by "John Doe". A strip of metal was inserted into the trunk of the car so that it would not lock. "John Doe" then drove his Cadillac to a point at 70th Place and St. Lawrence Avenue, and at about 10:00 P.M., the Cadillac was parked in a position where it was in view of the other agents and officers, with Bryson remaining in the trunk and "John Doe" at the wheel. Bryson remained concealed in the trunk from 10:00 P.M. to 11:05 P.M. (Tr. 17-19).

Durham testified that at this time the petitioner, Roviaro, accompanied by an unknown man in a 1951 Pontiac sedan arrived at the corner and that Roviaro entered the Cadillac and took a seat next to the driver, "John Doe" (Tr. 19).

The witness then described a circuitous route of travel by the Cadillac to a point west of Champlain Avenue on 74th Street in Chicago. The witness stated that he had followed the Cadillac in a Government automobile in which he was the lone occupant, and that when "John Doe" stopped the Cadillac he left the Government car and continued to watch the Cadillac. The witness said that

he then saw the petitioner leave "John Doe's" Cadillac, walk a few feet to an adjacent tree, where the petitioner bent over and picked up a small package which was dark in color. The witness said that he saw the petitioner turn and walk back to the Cadillac, the right front door of which was open, and make a motion as though leaving a package in the car. Durham said the petitioner then waved to "John Doe" and walked away from "John Doe's" Cadillac. These observations were made by the witness from a point about 100 feet away in the night-time between 11:00 and 12:00 P.M. (Tr. 23).

The witness Durham said that he watched Roviaro, the petitioner, walk away from "John Doe's" Cadillac, and stated that he thereupon went to the Cadillac and in the presence of "John Doe", seated in the front seat at the driver's wheel, picked up a small package from the metal stripping on the floor of the front seat compartment, this strip being part of the door frame. The witness said that he then followed Roviaro to the street corner immediately West of this occurrence and saw him enter the Pontiac sedan, previously described, and ride away. On Durham's return to "John Doe's" Cadillac he found Officer Bryson sitting with "John Doe" in the front seat (Tr. 23-26). The witness identified Government Exhibit 2, a sheet of purple paper, as the wrapper of the package he had found in the Cadillac sedan and stated that it contained three cellophane envelopes, which later testimony showed contained a white powder, and it was stipulated later in the evidence, that a Government chemist, if called as a witness, would testify that this white powder was partly heroin (Tr. 45-46).

According to Durham he met with Agent Fields and Police Officers Bryson and Sims at 69th and Cottage Grove shortly thereafter, at which time they conducted a field

test on the contents of the package that the witness testified he had recovered. Thereafter, sometime after midnight, Officers Bryson and Sims and the witness went to the front door of the petitioner's home, several miles away from the occurrence, and rang the door bell. The petitioner answered the door bell in pajamas. Upon their demand for entry, the petitioner admitted the officers, and they placed him under arrest. After examination of his home and his money, they took the petitioner to a police station at 11th and State Streets in Chicago. The examination of the petitioner's home did not disclose the presence of any narcotics or other contraband (Tr. 33-34).

During his direct examination, in the course of introducing the exhibits, containing and pertaining to the narcotics, which Durham said he had recovered from "John Doe's" Cadillac, the witness Durham identified Exhibit 6 as an evidence envelope, into which the narcotics had been placed after seizure and examination. This envelope, upon its face, bears a form upon which entries were made describing the case, the contents and the manner in which the narcotics were acquired by the Government. This exhibit is certified as part of the record in this proceeding and is bound in the Transcript of Record immediately after the transcript of evidence (Tr. 43).

This Exhibit 6 has, entered upon it, the Treasury Department Case No., the name and address of the petitioner, a description of the heroin which it contained upon production at trial; and immediately following the printed words, "How Obtained," it bears the entry "Found by Officer James L. Bryson," "74th & St. Lawrence Ave., Chicago, Illinois, August 12, 1954, Time 11:15 P.M." Opposite the printed words "Amount Paid" there is an entry "None." The witnesses are shown as J. T. Fields,

N. M. Durham, J. L. Bryson and G. T. Sims. The envelope further shows the agent reporting the case to be Norris M. Durham. Under the "Remarks" there is an entry stating "Ex. #1, weighed and sealed by Agent J. T. Fields, in the presence of Agent Durham, and delivered to the U. S. Chemist, Chicago, Ill., for analysis." On the reverse side of the envelope are two locking devices, and the handwritten entry "Weighed and Sealed, 2 oz. 389 grs. Heroin, Aug. 13, 1954, By J. T. F., witnessed 8/13/54 NMD."

On cross-examination the witness Durham stated that the only account he could give for the fact that Government Exhibit 6 contained the handwriting of Agent Fields to the effect that the package of heroin, which is the alleged subject of the offense charged, was found by Officer James L. Bryson at 74th and St. Lawrence Avenue, Chicago, Illinois, was that it must be an error on the part of Agent Fields (Tr. 75). He admitted that he had placed his initials upon the envelope, Government Exhibit 6, after Agent Fields had written the notation mentioned, and that the notation was inconsistent with his testimony (Tr. 75, 76).

The witness further admitted that a conversation with the petitioner, which began prior to arrival at the police station, continued for some three or four minutes at the police station, and that during that conversation the man referred to as "John Doe" stated that he did not even know Roviaro, the petitioner. The Court struck this statement from the record (Tr. 80-85).

The witness further admitted on cross-examination that he found no evidence of narcotics or contraband money in his examination of the home of the petitioner or upon his person. He further stated that the packages involved were examined for fingerprints and that neither the peti-

tioner's fingerprints nor those of any one else were found upon the packages (Tr. 117).

Cross examination as to "John Doe's" identity or correct name was denied (Tr. 60-63).

Police Officer Bryson, called as a witness on behalf of the Government, stated that he was a Chicago Police Officer. He described a meeting with Durham, Sims and John Doe at 75th and Prairie Avenue at 5:00 P.M. on August 12, 1954, and stated that the Cadillac, which John Doe was driving, was searched and that the person of John Doe was searched (Tr. 137-139).

The witness Bryson testified that he remained in the trunk of the Cadillac, driven by John Doe, from 10:00 P.M. on August 12th until 5 or 6 minutes after 11:00 P.M. At about 7 or 8 minutes after 10:00 P.M. someone got into the Cadillac and according to the witness, spoke to John Doe (Tr. 140, 142). Over objection, this witness testified to conversation, which he said he heard from the trunk, between John Doe and a person in the front seat, while the car was in motion on the circuitous route described by Agent Durham.

The Court stated, at this point, "I think it is subject to objection unless the witness can testify he is familiar with the voice of the party in question." (Tr. 144). The conversation appears at Pages 145 to 147. The witness did not testify at any time that he was familiar with or knew the voices of John Doe or of the person who was the other party to the conversation.

Officer Bryson further testified that after the arrest of the petitioner, the petitioner was placed in a seat of an automobile, between Agent Durham and the witness Bryson and that conversation between the three (3) then occurred, during which Officer Bryson told the petitioner

"We're going to put you down in this tank and let you see how these dope fiends live." He was further permitted to testify, over objection, that the petitioner had said that he knew nothing about any connection and said that he did not want to get anyone else in trouble. Bryson further said that the petitioner said "You got me." and "I've stood up twice before and I can stand up again." (Tr. 150).

On cross examination, Bryson stated that in continued conversation with the petitioner, at the Police Station, John Doe stated that he did not know the petitioner and had never seen him before.

Objection was sustained to cross examination as to the true name of John Doe and as to whether he was dead or alive.

George T. Sims testified on behalf of the Government that he was a Chicago Police Officer. He testified to the meetings on August 12, 1954 at 75th and Prairie Avenue and to the search of John Doe (Tr. 174, 175).

The witness Sims stated that he saw Roviaro get into the parked Cadillac, driven by John Doe, in which Officer Bryson was concealed in the trunk (Tr. 176). The witness then said that he and Agent Fields followed the Cadillac in a separate car from that of Agent Durham, but did not follow it to the point where Agent Durham claimed to have seen the petitioner pick up a package from the ground (Tr. 177). He said that they did later see Roviaro board the Pontiac sedan near 74th and St. Lawrence and ride away.

Cross examination was denied on the subject of the identity of John Doe (Tr. 184-185). Officer Sims said that John Doe remained in custody in the Police Station over night. The witness said that he did not know

whether any charge was ever filed against John Doe and that he had never been called upon to testify against him; that he had seen John Doe a half a dozen times and that the last time was around Christmas (Tr. 188). Officer Sims appeared as a witness before the Grand Jury, but did not reveal John Doe's correct name to the Grand Jury (Tr. 188, 189).

Agent Fields, a Federal Narcotics Agent, testified on behalf of the Government that he was present at the second (2nd) meeting of the Officers and John Doe at 75th and Prairie Avenue, at about 9:30 P.M. on August 12, 1954. He said that Agent Durham and he searched the interior of the Cadillac automobile which John Doe was driving, and that he saw Officer Bryson get into the rear trunk compartment of this car. He also stated that there was a search of the person of John Doe by Officer Sims and Agent Durham at this time (Tr. 192). This witness said that he saw the petitioner Roviaro get into the Cadillac, driven by John Doe. He did not see any alleged transfer of any package or material from the petitioner to any other person.

On cross examination, he stated that the information, which he wrote upon Government Exhibit 6, to the effect that the material enclosed (narcotics) was found by Officer James L. Bryson at 74th and St. Lawrence, was given to him by Agent Durham on August 13th (Tr. 201). He further stated that he was in several discussions and conferences with Bryson, Durham, Sims and John Doe from the time he had left 74th and St. Lawrence until he arrived at 11th and State Street, and that they did discuss the matters involved. He stated that he was told that nothing was paid in the transaction as it was described to him (Tr. 203).

Cross examination to the true identity of John Doe was denied upon objection by the Government (Tr. 204, 205). The witness said that Exhibit 6 was not an official Government report, and that he considered the official report as a written report, prepared after the conclusion of an investigation, that there were other reports, written by Agent Durham, with regard to this transaction, but the witness did not know whether they coincide with the statement by Durham to the witness Fields that the narcotic material was found by Officer Bryson at 74th and St. Lawrence Avenue (Tr. 206).

Counsel for the petitioner, at this point, requested Agent Durham's written statements and the Court sustained the Government's objection to such production (Tr. 209, 210).

It was stipulated that if the Government Chemist was called, he would testify that Government Exhibits 8, 9 and 10 contained material which assayed as 80.3 percent heroin and 6.4 percent morphine.

The evidence of the witnesses is set forth in some detail because the Record was not printed for the use of the Court of Appeals below, by Order of that Court, which excused the printing because of the comparatively short Record.

REASONS FOR GRANTING WRIT.

The importance of this case lies in the fact that it presents an important question of federal law which has not been, but should be settled by this Court, that is, whether the suppression by the Government and the trial Court of the identity of an informer who was an active principal participant in the transaction prosecuted, and whose testimony undoubtedly could have thrown light upon the truth of the event involved, constitutes a denial

of the right of the accused to know the nature of the charge against him, and infringes upon his right to compulsory process for the witnesses in his favor, and constitutes an arbitrary denial of the right of cross-examination, and thereby denies due process of law. *Portomene* v. *United States* (C.A. 5) 221 F. 2d 582.

The Court of Appeals below has decided a federal question involving the right to production and inspection of extra judicial statements of a Government witness in a way which is in conflict with applicable decisions of this Court, *Gordon* v. *United States,* 344 U. S. 414. The Court of Appeals below further has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower Court as to call for an exercise of this Court's supervision, by affirming a conviction for a knowing and fraudulent violation of the law in a case where there was no proof of such knowing and fraudulent violation established or claimed before the District Court or the Court of Appeals; both Courts below having relied upon their improper interpretation of a statutory presumption.

I.

The indictment in this case contained two counts, both of which were based upon a single occurrence or transaction which the evidence indicates occurred completely between 11:00 and 12:00 P.M., on August 12, 1954. A single alleged transaction in narcotics was prosecuted in two counts because such a transaction as alleged would be violative of two separate statutes enacted by Congress, to-wit: Section 2554(a), Title 26, U.S.C.; and Section 174, Title 21, U.S.C. The first count of the indictment charged a sale of narcotics by the petitioner to "John Doe" on August 12, 1954, at Chicago, Illinois; and the second count charged that at the same time and place the petitioner did fraudulently and knowingly re-

ceive, conceal, buy and facilitate the transportation and concealment after importation of a quantity of narcotic drug, knowing the same to be imported into the United States contrary to the law.

The petitioner made a prompt and timely request for particulars, in which he asked for the name, address and occupation of the person described as "John Doe" in the indictment. The request for particulars was denied in all respects. The evidence of the Government showed that the person described in the indictment as "John Doe" and referred to by the Government witnesses throughout the trial, as "John Doe", was, in fact, an informer set up by the Government agents for the purposes of the offense prosecuted (Tr. 81-82).

The Government's evidence further showed that this informer, "John Doe", was more than a mere informer, that he was, in fact, an active principal participant in all of the events upon which the prosecution was based. The acts prosecuted by the Government in this case could not have been described without detailed testimony concerning the actions and conduct of "John Doe". No guilty conduct by the petitioner was described by any Government witness as having occurred prior to the petitioner's entry into the Cadillac automobile driven by "John Doe" on the night in question. The conduct relied upon for conviction, thereafter, consisted of the petitioner's ride as a passenger in the automobile driven by "John Doe" through the streets of Chicago to the point where the alleged transfer of narcotics occurred. At this point the petitioner left the automobile of "John Doe", and in full view of "John Doe" is alleged to have picked up a small dark package and presumably to have placed that package in "John Doe's" automobile at a place adjacent to where "John Doe" was sitting and

within his reach. According to the witnesses, the petitioner then walked away from the automobile of "John Doe" leaving the package in "John Doe's" possession and control. Within seconds thereafter a package containing narcotics was recovered from "John Doe's" presence in his automobile by some agent or officer acting for the Government.

It is submitted that it is absurd to contend that "John Doe" was not a participant in the alleged activities of the petitioner relied upon for conviction under Count II of the indictment charging receipt, concealment, purchase and facilitation of transportation and concealment of narcotics.

There is no evidence to indicate the means whereby the package picked up by the petitioner was deposited in the parkway adjacent to the point where "John Doe" had driven his Cadillac automobile.

The Court of Appeals below has based its decision upon its conclusion at page 2 of its Opinion (Appendix) "John Doe had nothing to do with the defendant's illegal possession or carriage of the package; he was not a participant in any sense of the word, in defendant's procurement and transportation of the package."

It is respectfully submitted that this holding by the Court of Appeals as a basis for decision, is a highly unreasonable construction of the status of "John Doe" in the event described by the Government's witnesses. It appears to be an adoption by the Court of Appeals of the desperate reasoning urged by the Government upon appeal, when it was recognized that reversible error had occurred by reason of the denial of the bill of particulars and the refusal to allow cross-examination concerning the identity of "John Doe". Was not "John Doe" an

aider and abettor, or a conspirator acting in concert in the most indulgent view of the Government's evidence?

Of course, no one can gainsay the fact that "John Doe" was a person whose testimony could have thrown substantial light upon the events relied upon for conviction under each Count. The very failure of the Government to call this active participant in the affair indicates that his testimony would have been favorable to the petitioner. This man, whose identity was concealed from the trial of facts and from the petitioner and, therefore, could not be the subject of subpoena by the trial Court or by the petitioner as a witness in the petitioner's favor, was an informer whom the Government had peculiarly within its power to produce. His testimony, without question, would have elucidated the transaction involved in both Counts. This gives rise to the presumption that his testimony would be unfavorable to the Government.

The following quotation is from *Scanlon* v. *United States*, 223 F. 2d 382 at 392, an opinion by Judge Hartigan of the Court of Appeals for the First Circuit, dated June 13, 1955:

> "In *Graves* v. *United States*, 1893, 150 U.S. 118, 14 S. Ct. 40, 37 L. Ed. 1021, the Supreme Court, although reversing a conviction because of prejudicial comment by the district atorney, stated at page 121 of 150 U.S. at page 41 of 14 S. Ct.: 'The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.' This rule has been generally followed and consequently comments on the non-production of evidence which is peculiarly within the control of the other party

have been allowed. 88 C.J.S., Trial, § 184; *Chesapeake & O. Ry. Co.* v. *Richardson*, 6 Cir., 1941, 116 F. 2d 860, certiorari denied 313 U.S. 574, 61 S. Ct. 961, 85 L. Ed. 1531; *Milton* v. *United States*, 1940, 71 App. D.C. 394, 110 F. 2d 556; See *Bell* v. *United States*, 4 Cir., 1951, 185 F. 2d 302, 309, certiorari denied 340 U.S. 930, 71 S. Ct. 492, 95 L. Ed. 671."

While the Government's fear for the disclosure of the identity of "John Doe" strengthens and bolsters to a conclusive degree the presumption that unidentified and missing "John Doe's" testimony would be favorable to the petitioner, the testimony of a Government witness is even more convincing

Pages 153 and 154 of the Transcript of Evidence contain the admission by Police Officer Bryson that "John Doe", when confronted by the petitioner, said that he did not know the petitioner and had never seen him before. This is the "John Doe" described by all witnesses as the driver of the Cadillac and the active participant in the acts prosecuted. Under the facts in this case the petitioner was deprived of information as to the nature and cause of the accusation by the denial of a bill of particulars. The denial of the right to cross-examine each of the Government witnesses as to the true identity of "John Doe" compounded this prejudicial error and worked destruction on the petitioner's right to a fair trial and due process of law (Tr. 9, 60, 167, 184, 185, 188, 189, 204, 205).

The Court of Appeals for three Circuits have passed upon the suppression of the identity of informers who were also active participants in the events prosecuted.

In *Sorrentino* v. *United States*, (C.A. 9) 163 F. 2d 627, it was held that the denial of information as to the identity of an active participant in the transactions prose-

cuted was error. However, since the record showed in that case that it was clear that the defendant knew the name of the informer, and that sufficient testimony established this beyond doubt, no prejudice arose, and therefore reversal was not required. In the case at bar the Government cannot point to the record and claim that the petitioner knew the name or identity of the informer.

United States v. *Conforti,* 200 F. 2d 365, is a decision of the Court of Appeals for the Seventh Circuit, which Court also decided the case at bar. In that case the Court of Appeals held that it was error to deny cross-examination as to the identity of an active participant informer but discovered that the identity was not actually requested. The Court said that had the proper questions been asked, the denial would have been prejudicial. In the case at bar, every one of the four Government witnesses were specifically asked for the true name of "John Doe" upon cross-examination, and in every case the Government's objection to such cross-examination was sustained.

The Court of Appeals for the Fifth Circuit recently decided the case of *Portomene* v. *United States,* 221 F. 2d 582. This decision discussed the *Conforti* and *Sorrentino* decisions, and reversed a conviction in a narcotics case because the defendant was deprived of information concerning the identity of an active principal participant, who also happened to be an informer.

The petitioner here respectfully urges that the decision in *Portomene* v. *United States,* (C.A. 5) 221 F. 2d 582, is a proper decision completely appropriate to the issues in this case, and it is urged that the decision of the Court of Appeals below, from which review is asked, is contrary to the decision in *Portomene* v. *United States,* 221 F. 2d 582, and that the conflict between the two

decisions with the obvious difference in results, is apparent despite the attempts by the Government and the Court of Appeals below to distinguish this case from the *Portomene* decision. In the case at bar the Court of Appeals below has arbitrarily stated that it is not disputed that "John Doe" was not a participant in the petitioner's illegal possession charged in Count 2. It is apparent from the facts in the case at bar that this is not true.

Despite the fact that the petitioner did not take the stand in the case at bar, his case was submitted to the trial Court for decision upon his plea of not guilty. The Government's evidence showed that "John Doe" had the best position and opportunity for determination of the identity of the person who sat next to him in his Cadillac, and who retrieved a package of narcotics from the ground adjacent to "John Doe's" Cadillac and allegedly left it with "John Doe" in his Cadillac car, and he stated that the petitioner was unknown to him and that he had never seen him before (Tr. 154). This statement by "John Doe" was within an hour or two of the occurrences prosecuted. So it would appear that under any view of the evidence the petitioner's "position" was in dispute, even following the evidence of the Government agents.

The disclosure of "John Doe's" identity, which would have made possible his production of the witness, could have raised serious doubt as to whether any "possession" of any character had been found in the petitioner. It is obvious that the petitioner's defense was substantially prejudiced in so far as both counts were concerned because "John Doe's" participation in both alleged offenses was unquestioned and permeated the entire evidence relied upon to establish petitioner's culpability.

It is respectfully suggested that this conviction should be reversed upon authority of *Portomene* v. *United States*, 221 F. 2d, 582, despite the efforts of the Court below to distinguish it from the case at bar.

Suppression of the informer's identity, without adequate justification, prevented the petitioner from producing him as a witness to give the favorable evidence indicated by his denial that he had carried on any transaction with petitioner, or knew him (Tr. 154). Issuance of a subpoena for "John Doe", without address or description, would be ridiculous and useless. The petitioner was denied the right to compulsory process for a specific witness in his favor by the trial court's support of the Government's concealment of this important participant witness whose testimony could have been vitally important.

II.

A substantial question concerning the truthfulness and accuracy of Agent Norris Durham and Officer Bryson developed when it appeared that Government Exhibit 6, an official evidence envelope, which was transmitted as part of the Record in this case, contained a notation that the narcotics involved in the case were "Found" by Officer Bryson rather than recovered by Agent Durham. This evidence contradicted the sworn testimony given by Agent Durham and Officer Bryson as Government witnesses.

Agent Fields testified that he had made the entries on Exhibit 6, and that Agent Durham gave him the information that the narcotics had been found by Officer Bryson on August 13, the day following the date alleged in the indictment (Tr. 201). Examination of Exhibit 6 shows that Durham placed his initials on the reverse side of the envelope, and he testified that he had done

this after the face of the envelope had been filled in. This statement on Exhibit 6 was contradictory of his evidence, by his own admission (Tr. 75, 76), and his only reason or explanation was mistake.

Agent Fields testified that there were other reports written by Agent Durham concerning the transaction which was the subject of the prosecution. He stated, however, that he did not know whether Agent Durham's written reports coincided with Durham's oral statement to Fields concerning the manner of acquisition of the narcotics involved (Tr. 206).

At this point counsel for petitioner requested permission to see Agent Durham's written statements concerning the transaction. The prosecutor stated that he did not have Durham's written statements with him in Court and asked if they could be produced the following morning (Tr. 206). The trial Judge stated "We are going to conclude this case today, gentlemen." After considerable argument the Court denied the request for production of these statements (Tr. 209).

If Agent Durham did not tell the truth concerning the finding of the package, then his entire story in its important parts is shattered. Certainly his testimony on this was material, in fact crucial. If he did not find the package in "John Doe's" automobile, what happens to the inference that it is the same one picked up by the petitioner? Did Durham substitute or confuse another package given him by Bryson? Did he forget the facts of the transaction prosecuted?

Certainly, his written reports should elucidate or throw light on this point. Inspection of these reports, the existence of which was established by Agent Fields' testimony, would permit a determination of whether Agent

Durham had made *additional* extra-judicial statements at variance with his sworn testimony . If these contradicted or varied from his testimony, the trial Court's, and probably any Court's, confidence in his testimony might be affected to a point where his entire testimony must be disregarded. He was not corroborated on the deposit of any package in "John Doe's" car, or on his testimony that he found it. He was impeached on this point by extra-judicial statement to Agent Fields (Ex. 6). The only possible fully corroborating witness was concealed and withheld from the Courts and the petitioner, by the Government, despite repeated and proper efforts of the petitioner, to secure disclosure.

It is respectfully submitted that in *Gordon* v. *United* States, 344 U.S. 414, the foundation laid for a request for production of documents was only slightly different, in facts, but is not distinguishable in principle.

In the case at bar the record shows by Agent Fields that the documents (Agent Durham's statements) were in existence, were in possession of the Government, were made by the witness whose credibility was in question; that the witness had made extra-judicial material statements contrary to his testimony, and the contradiction was on a relevant, material and important matter which directly bore on the main issue being tried, to-wit, did the petitioner deposit a package of narcotics in "John Doe's" auto, in "John Doe's" presence; and was that the package recovered by Durham from "John Doe's" presence and automobile or was Durham inaccurate or untruthful in his uncorroborated testimony?

The Court is asked to consider *Asgill* v. *United States*, (C.A. 4) 60 F. 2d 776; *United States* v. *Krulewitch*, (C. A. 2) 145 F. 2d 76, 79; *People* v. *Davis*, 52 Mich. 569, 18 N.W. 362; *People* v. *Bachman*, 41 Nev. 197, 168 P. 733; *People*

v. *Schainuk,* 286 N.Y. 161, 164, 36 N.E. 422. These were said to be highly respectable authority in state and lower federal courts in support of the view that an accused is entitled to production of such documents, in the unanimous opinion of the Supreme Court in the *Gordon* case, 344 U.S., 414, 419.

See also *United States* v. *Andolschek,* 142 F. 2d 503, 506, and *United States* v. *Coplon,* 185 F. 2d 629, 638.

The petitioner, as his conclusion on this point, adopts this quotation from *Gordon* v. *United States,* 344 U.S. 414, 419:

> "Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that 'The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons'. (*People* v. *Davis,* 52 Mich. 569, 573, 18 N. W. 362)."

III.

The Court of Appeals below has justified its affirmance of this conviction on the second count only, because under the Statute there involved, Congress has prescribed that possession of a narcotic drug shall be sufficient to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury (Sec. 174, T. 26, U.S.C.A.).

The Count involved *charges* that the petitioner did *knowingly* and *fraudulently,* receive, conceal, buy and facilitate the transportation after important of a quantity of narcotic drug, *knowing* the same to have been imported contrary to law. *United States* v. *Carll,* 105 U.S. 611, 26 L. Ed. 1135.

It is submitted that it cannot have been the intention of Congress to authorize conviction regardless of whether

the petitioner was afforded a fair trial, if only the Government produced some evidence which might support an inference of any kind of possession. It is the petitioner's contention that substantial trial errors which infringe upon or deprive the accused of Constitutional rights, certainly could cause reversal in such a condition.

However, the petitioner further contends that the statutory authorization of *conviction* unless *the defendant* explains to the satisfaction of the jury, certainly is not properly based upon any illusory, fleeting possession, or, even upon an actual possession of a package which the circumstances in the evidence fail to show is a knowing possession of narcotics. It is far more than a mere evidentiary presumption, for who is to say what *explanation* by a *defendant*, on such a scandalous charge would *satisfy* a jury of twelve.

The question with which petitioner was faced at close of the Government's case, was whether conscious and knowing physical handling of a package containing contraband, without proof of knowledge of the contraband contents, can support and trigger into effect a statutory authorization of conviction of a knowing and fraudulent act. The Court below adopts the position that any type of possession will do.

In the case at bar there is no evidence in the record to support a contention that the petitioner had knowledge of the contents of the package during the momentary handling of it by him. According to the Government's evidence he procured it from the adjacent ground for "John Doe" who remained in his Cadillac next to the place where the package was found, and his fleeting possession was for only the time it took to step back to the undisclosed informer's car.

If the petitioner did not know what was in the package, and no evidence shows that he did, then it is illogical and irrational to authorize his conviction of knowing and fraudulent possession of narcotics. It is suggested that the mere handling or possession of a harmless appearing package which gives no indication of its contents will not support the conclusion that a temporary handler or possessor has knowledge and purpose sufficient to convict. Otherwise the presumption of innocence has been destroyed, and the burden of proof beyond a reasonable doubt has been reduced to a shadowy feather.

It is a far more rational and reasonable conclusion to believe that the purpose of the statute was only to presume that *knowing* possession of narcotics would authorize conviction because of the presumption that the knowing possessor acknowledged that the narcotics were illegally imported, unless he explained lawful importation or legally authorized possession. This inference of the knowledge that the narcotics were illegally imported is reasonable and consistent with human experience. It was not contended by the Government in the Court below, that the evidence sustained in any degree a conclusion that the petitioner knew the contents of the innocent appearing package handled by him to have been narcotics, in the absence of indulgence in presumption. The Court of Appeals, in its opinion, has taken the position that proof of knowledge and fraudulent purpose are unnecessary. Cf. *United States* v. *Di Re,* 332 U.S., 581, 593; and *Tot* v. *United States,* 319 U. S. 463, at 469.

In discussing possession in a stolen property case Mr. Justice Minton of the Supreme Court, while a Judge of the Court of Appeals for the Seventh Circuit, said in *United States* v. *Wainer,* 170 F. 2d 603 at page 606, "To 'possess' means to have actual control, care and manage-

ment of and not a passing control, fleeting and shadowy in its nature. *State* v. *Cooper*, Mo. App., 32 S.W. 2d 1098, 1099."

The Supreme Court of the United States has said, "Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding. See Thayer, Preliminary Treatise on Evidence (1878) cc 8 and 9; Wigmore, Evidence 3d ed. §§ 2490-2540; Morgan, Some Observations Concerning Presumptions (1931) 44 Harvard L. Rev. 906; Denning, Presumptions and Burdens (1945) 61 Law Quart. Rev. 379." (*Bollenbach* v. *United States*, 326 U. S. 607, 614).

In *Tot* v. *United States*, 319 U.S. 463, at Pages 467 and 468, the Supreme Court of the United States discusses the validity of legal presumptions, or presumptions of evidence as prescribed by State Legislature or the Congress of the United States. It holds that in every instance they must be reasonable and "cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the one in common experience". It is not reasonable to assume everyone knows the contents of any package he handles. On the other hand, if knowledge that the package contains narcotics is proved, knowledge of unlawful importation may be presumed reasonably.

It is respectfully submitted that the inferred and presumed, fleeting and shadowy possession established in the record in this case is an improper and unlawful basis upon which to trigger into effect a statutory presumption and rule of evidence relied upon by the prosecution.

In any event, it is clear and unequivocal that "John Doe" was a full, active participant, under the evidence,

in all phases of the transaction and "possession" relied upon. Under these circumstances, it was plain reversible error to deny the defendant a fair trial by refusal to disclose the identity of "John Doe" in a bill of particulars, properly requested, and to deny proper cross-examination of the Government witnesses concerning the identity of "John Doe", and to hinder and prevent the petitioner from securing a witness in his behalf.

See Justice Roberts' discussion of *Yee Hem* v. *United States,* 268 U. S. 178, 69 L. Ed. 904, and *Casey* v. *United States,* 276 U.S. 413, 72 L. Ed. 632, in the *Tot* decision, 319 U.S. 463, at pages 471 and 472. It is suggested and urged that the petitioner must be *proven to know* that he has possession of narcotics, and that then a presumption of knowledge that it was unlawfully imported takes effect, and authorizes conviction.

As interpreted below, the statute destroys the presumption of innocence, removes the burden of proof on an essential element of the offense, prescribed by statute and charged in the indictment, and places upon the accused a burden of proving his innocence to an indefinable standard or degree of proof, "the satisfaction of the jury".

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH,
Attorney for Petitioner.

APPENDIX.

OPINION.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11616. OCTOBER TERM, 1955, JANUARY SESSION, 1956.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ALBERT ROVIARO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 7, 1956.

Before FINNEGAN, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

LINDLEY, *Circuit Judge.* In a trial before the court without a jury, defendant was found guilty upon the two counts of an indictment charging that he (1) on August 12, 1954, sold to one John Doe heroin in violation of 26 U. S. C. § 2554 (a), and (2) on the same date, in the city of Chicago, knowingly received, concealed and facilitated the transportation, after importation, of heroin in violation of 21 U. S. C. § 174. The court entered a general sentence, ordering defendant imprisoned for two years and fined.

Upon appeal, defendant asserts error in that the court (1) denied his petition for a bill of particulars disclosing

the home address and occupation of John Doe; (2) unduly limited the cros-examination concerning the identity of the said Doe; and (3) wrongfully denied his request for production of a report of Narcotic Agent Durham.

In support of the first two alleged errors defendant urges that, inasmuch as Count I charged sale of narcotics by defendant to John Doe, the latter became more than a mere informer but an active participant in the transaction, as the purchaser of the contraband goods. He recognizes the rule that if the person named is only "an informer and nothing more" defendant is not entitled to have his identity disclosed; but he insists that, where the so-called informer is an active participant in the illegal transaction, the defendant is entitled to full disclosure of the identity of the participant, and cites in support of his argument, *Sorrentino* v. *United States,* 163 F. 2nd 627 (CA—9); *United States* v. *Conforti,* 200 F. 2d 365 (CA—7); *Portomene* v. *United States,* 221 F. 2d 582 (CA—5). However, in view of our conclusions, we find it unnecessary to decide whether the facts at bar bring the case within the authorities cited, inasmuch as it is undisputed that John Doe was not a participant in defendant's illegal possession charged in Count II. This we think will be clear from a brief review of the undisputed evidence.

Both Agent Durham and Police Officer Bryson witnessed the transactions involved in the charges of Count II, Officer Bryson from the trunk of a Cadillac automobile where he was concealed, and Agent Durham from a point a short distance away from defendant. Each saw defendant go to a certain tree, pick up a package, and carry it to the Cadillac. This package, when analyzed, was found to contain heroin. John Doe had nothing to do with defendant's illegal possession or carriage of the package; he was not a participant in any sense of the word, in defendant's procurement and transportation of the package. Proof of his identity would not have shed any light at all upon the undisputed, illegal acts of defendants, *United States* v. *Li Fat Tong,* 152 F. 2d 650, 652 (CA—2), for the latter's possession and carriage of the package alone furnished

prima facie evidence of guilt under Count II and left him with the burden to prove that he possessed the narcotics lawfully. *United States* v. *Li Fat Tong*, 152 F. 2d 650, at 652, and cases there cited. Indeed, such is the express provision of 21 U. S. C. § 174. See *United States* v. *White, et al.*, ... F. 2d ..... (CA—7), (No. 11516 decided January 6, 1956), and cases there cited. It follows, then, that since the evidence of guilt upon Count II is undisputed, and under it, John Doe was in no wise implicated with the illegal possession of defendant, any question of his identity is wholly immaterial on this charge.

It follows also that, inasmuch as the sentence was general and guilt under Count II is sufficient to support the sentence, it is, as we have pointed out, immaterial as to whether error intervened as to Count I, for it has long been established that if a sentence does not exceed that which may lawfully be imposed under any single count, the judgment must be affirmed, if the evidence is sufficient to sustain any one of the counts. *Abrams* v. *United States*, 250 U. S. 616; *Sinclair* v. *United States*, 279 U. S. 263, at 299; *Brooks* v. *United States*, 267 U. S. 432, at 441; *United States* v. *Iacullo*, 226 F. 2d 788, 795-796 (CA—7).

We have remaining the question of whether the trial court committed prejudicial error in refusing defendant's request for production of Agent Durham's alleged written report to the Narcotics Division. This question arose upon defendant's cross-examination of Durham, who testified that he found the package of contraband wares picked up by defendant and deposited by him in the automobile. The captured narcotics were, for safe-keeping, preserved in a sealed manila envelope, which was produced and introduced in evidence. It bore a label in Agent Field's handwriting, stating that the narcotics had been "found by Officer Jas. L. Bryson," and was witnessed by Agents Field and Durham and Officers Bryson and Sims. This label, of course, was not evidence; it was added, after the event, merely for purposes of identification.

To our minds, it was wholly immaterial as to who found the package. The sworn testimony of Bryson and Dur-

ham is not at variance. The two searched the automobile before defendant deposited the package therein. Bryson sat in the trunk, the lid of which was propped partly ajar. After the car was parked, defendant appeared in his Pontiac. He then got in the automobile in which Bryson was concealed, which was then driven to the place where the violation was observed. There Durham saw defendant get out of the car, leaving the door open, proceed a short distance to a tree, stoop down, pick up a package, take it to the automobile, and place it therein. When he left, Durham walked to the car and there saw the package and picked it up. He wrapped it in a handkerchief and gave it to Officer Bryson who delivered it to the chemist. Bryson testified that he lifted the trunk lid slightly, and observed defendant go to the tree, pick up the package, return to the car, and then depart. He testified that Durham then reported to him that he could come out, and that he emerged and saw that Durham had the package in his hand. Later he witnessed the label on the envelope with the other agents and officers. Thus, it appears undisputed that both Durham and Bryson saw defendant pick up the package, which proved to be heroin. Both saw him carry it to the car where Bryson was concealed. Both saw him in sole possession of the narcotics. Both participated in their preservation. In the situation, we think it wholly unimportant and immaterial as to whether Field noted on the envelope that the narcotics were found by Bryson or whether the others so indicated. The envelope was employed to keep the narcotics safely, not to supply evidence as to which officer first saw defendant in possession. Inasmuch as the label was wholly immaterial, of course, to compel a report to be produced, merely because it was asserted that in some way it might possibly contradict an immaterial matter, would have been improper.

Furthermore, as the Supreme Court said in *Goldman* v. *United States*, 316 U. S. 129, 132: "We think it is the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. * * * a large

discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case." See also *United States* v. *Lightfoot*, ... F. 2d ....., (CA—7), (No. 11470, decided January 12, 1956) and other cases there cited.

Then, too, we think there was no sufficient showing of the materiality of the report. In *United States* v. *Bookie, et al.*, ... F. 2d ..... (CA—7), (No. 11498, decided January 12, 1956), we had occasion to consider a similar situation. There defendant, in the course of the trial, made a demand for production of a report of the arresting officers to their superiors. This the court denied. We held that such action did not constitute prejudicial error, for the reason that there was no showing that the report contained evidence material or relevant to the issues in the cause, citing *United States* v. *Chichester Chemical Co.*, 298 Fed. 829 (CA—DC), and *Moffatt* v. *United States*, 232 Fed. 522 (CA—8). We remarked that nothing in the Acts of Congress or the Rules of Criminal Procedure requires "a court to permit such a fishing expedition in the course of a trial." So here the witness had not made use of or relied upon the report. Defendant made no showing that anything therein was in conflict with the witness' testimony or that the document contained anything material or relevant to the cause. Consequently, it was well within the discretion of the trial court to deny the demand. Nothing in *Gordon* v. *United States*, 344 U. S. 414, conflicts with this conclusion, for there, as the court pointed out at page 418, adequate showing had been made that the document contained evidence material and relevant to the issues on trial.

For the reasons stated, the judgment is

AFFIRMED.

A true Copy:

Teste:

/s/ Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Tuesday, February 7, 1956

Before

Hon. Philip J. Finnegan, Circuit Judge

Hon. Walter C. Lindley, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11616 *vs.*

ALBERT ROVIARO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby,

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Wednesday, March 7, 1956

Before

Hon. Philip J. Finnegan, Circuit Judge

Hon. Walter C. Lindley, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11616 *vs.*

ALBERT ROVIARO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby,

DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of the Opinion, filed February 7, 1956, Judgment entered February 7, 1956, and Order denying Petition for Rehearing, entered March 7, 1956, in

Cause No. 11616

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

ALBERT ROVIARO, *Defendant-Appellant.*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this twelfth day of March A. D. 1956.

/s/ Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

(Seal)

Office - Supreme Court, U.S.
FILED
SEP 13 1956
JOHN T. FEY, Clerk

No. 58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

ALBERT ROVIARO,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

BRIEF FOR PETITIONER, ALBERT ROVIARO.

MAURICE J. WALSH,
105 West Adams Street,
Chicago 3, Illinois,
Attorney for Petitioner.

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutory and constitutional provisions involved	4
Statement of the Case	6
Evidence	7
Summary of Argument	15
Argument:	
I. The refusal of disclosure of the identity of "John Doe" an active principal participant in the transaction prosecuted, and the name as such in the indictment, deprived the petitioner of a fair trial; and denial of particulars concerning his identity vitiates Rule 7(f) of the Federal Rules of Criminal Procedure and infringed upon the petitioner's constitutional rights to be informed of the nature and cause of the accusation, and to have compulsory process for obtaining witnesses in his favor	18
II. The denial of the petitioner's request for production of written statements and reports of an agent witness, who was proved to have made oral statements to an associate which contradicted his testimony on a crucial issue, was reversible error	27
III. The decision of the Court of Appeals that *any* possession of narcotics, even without knowledge, will justify conviction under Section 174, Title 21, U.S.C., is erroneous	30
Conclusion	35

PAGE

Citations.

Cases:
Asgill v. United States, (C.A. 4) 60 F. 2d 776 30
Bollenbach v. United States, 326 U. S. 607, 614 33
Casey v. United States, 276 U. S. 413, 72 L. Ed. 632 34
Gordon v. United States, 344 U. S. 414 .....16, 29, 30
People v. Bachman, 41 Nev. 197, 168 P. 733 30
People v. Davis, 52 Mich. 569, 18 N.W. 362 30
People v. Schainuk, 286 N.Y. 161, 164, 46 N.E. 422 30
Portomene v. United States, (C.A. 5) 221 F. 2d 582 .....15, 23, 24
Scanlon v. United States, 223 F. 2d 382, 392 21
Sorrentino v. United States, (C.A. 9) 163 F. 2d 627 .....15, 22
Tot v. United States, 319 U. S. 463, 469 .....17, 33-34
United States v. Andolschek, 142 F. 2d 503, 506 ....16, 30
United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135 31
United States v. Conforti, (C.A. 7) 200 F. 2d 365 ..15, 23
United States v. Coplon, 185 F. 2d 629, 638 .....16, 30
United States v. Di Re, 332 U. S. 581, 593 33
United States v. Krulewitch, (C.A. 2) 145 F. 2d 76, 79 .....16, 30
United States v. Wainer, 170 F. 2d 603 33
Yee Hem v. United States, 268 U. S. 178, 69 L. Ed. 904 34

Constitution and Statutes Involved:
Constitution:
Sixth Amendment 5, 26, 27
Statutes:
Sec. 2554(a) Title 26, U.S.C. 4, 6, 18
Sec. 174, Title 21, U.S.C. 3, 4, 6, 15, 16, 18, 30
Rules 7(c) and 7(f) of Federal Rules of Criminal Procedure 5-6, 16, 25, 27
Rule 12(c) and Rules 26 to 37 of Federal Rules of Civil Procedure 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 58

ALBERT ROVIARO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

BRIEF FOR PETITIONER, ALBERT ROVIARO.

OPINION BELOW.

The opinion in the Court of Appeals (R. 141-145) is reported at 229 F. 2d 812.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 7, 1956 (R. 141). On March 7, 1956, the Court of Appeals denied the petition for rehearing (R. 146). The petition for certiorari was filed within thirty days thereafter and was granted May 21, 1956 (R. 146). The jurisdiction of this Court is conferred by 28 U.S.C. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Was it reversible error to conceal and hide from the defendant the true identity of an informer and active principal participant in the acts complained of, who was described in the indictment and referred to by Government witnesses throughout the trial as "John Doe", although these witnesses admitted knowledge of "John Doe's" true identity? And where this concealment of identity of an active principal participant was accomplished by denial of a prompt request for particulars, and by complete and arbitrary denial of the right to cross-examine Government witnesses on the point, was not the defendant deprived of information as to the nature and cause of the accusation, and of a fair trial and due process of law?

2. Did the refusal to disclose the identity of "John Doe" an informer and active participant in the matters prosecuted, and failure to produce him as a witness, when the record indicated he was a favorable witness to the defendant, (R. 95) infringe upon and effectively destroy the accused's right to have compulsory process for obtaining witnesses in his favor?

3. Where it appeared from written entries upon a Government exhibit, and by testimony of a Government witness who made the entries, that a prior Government Agent witness had made oral statements contrary to his testimony on a crucial item of evidence, was it error to refuse a request for inspection of existing written statements of the Government Agent on this point?

4. Where a statute (Sec. 174 Title 21 U.S.C.) provides that "Whoever *fraudulently* or *knowingly* imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, *knowing* the same to have been imported contrary to law," shall be punished; and further that "Whenever on trial for a violation of this subdivision the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury"; and the indictment charges that, "defendant herein, did then and there *fraudulently* and *knowingly* receive, conceal, buy and facilitate the transportation after importation of a quantity of a certain narcotic drug, . . . *knowing* the same to be imported into the United States contrary to law" (Emphasis supplied); can evidence of fleeting and inferential possession of a package for a matter of seconds, *without any proof of knowledge* of existence of narcotics therein, or fraudulent purpose, by defendant, trigger into effect the statutory provision that possession shall be sufficient evidence to authorize conviction, in a case where the defendant offers no evidence but relies on a motion for acquittal at the close of the Government's evidence?

5. Is it necessary for the Government's evidence to support or establish the inference of knowing or conscious possession of narcotics, before the burden of proof, or "burden of proceeding", shifts to the de-

fendant and requires him to explain possession to the satisfaction of the jury, in a prosecution for knowing and fraudulent possession of narcotics, knowing them to be imported contrary to law, in violation of Section 174, Title 21, U.S.C.A.?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Section 174 of Title 21, U.S.C., in effect during the period involved in this case, and in so far as pertinent, provided:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years."
>
> * * * * *
>
> "Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Section 2554(a) of Title 26, U.S.C., in effect during the period involved, provided:

> "It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

The Sixth Amendment to the Constitution of the United States, provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Rules 7(c) and 7(f) of the Federal Rules of Criminal Procedure, provide:

> "(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."
>
> "(f) Bill of Particulars. The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten

days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires."

STATEMENT OF THE CASE.

The petitioner was convicted of violation of Section 2554(a), Title 26, U.S.C. and of Section 174, Title 21, U.S.C. in a trial by the Court, without a jury. The trial commenced on June 13, 1955, and all evidence was completed on that day. The Court took the matter under advisement and authorized the filing of briefs. On October 17, 1955, the petitioner's motion for judgment of acquittal at the close of the evidence was denied and the Court entered a judgment of guilty on the two counts of the indictment and sentenced the defendant to two years imprisonment and to payment of a fine of $5.00 on each count, the sentences to imprisonment to run concurrently.

On October 19, 1955, the trial Court overruled the petitioner's motion for new trial and fixed bond on appeal in the sum of $10,000.00, which bond was filed with the Clerk of the District Court.

Count I charges that the petitioner, Albert Roviaro, did on August 12, 1954, at Chicago, Illinois, sell to "John Doe" for a consideration, unknown to the Grand Jurors, a quantity of narcotics, not in pursuance of a written order from the said "John Doe" on a form issued by the Secretary of the Treasury; in violation of Section 2554(a), Title 26, U.S.C.

Count II charges that the petitioner, Albert Roviaro, on August 12, 1954, at Chicago, Illinois, did then and there fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after impor-

tation a quantity of a narcotic drug, knowing the same to be imported into the United States contrary to law; in violation of Section 174, Title 21, U.S.C.

The petitioner filed a Motion for Bill of Particulars which asked for the following information:

1. What is the name, address and occupation of the alleged purchaser described as "John Doe" in Count I of the Indictment?

2. On what date and at what time on said date did the alleged offense occur?

3. At what place, by street and number, did the offense or offenses charged in the Indictment occur?

The Prosecutor vigorously opposed this request for particulars, contending that "John Doe" was a mere informer and that secrecy as to his name and identity was important to the United States, and that the Government should not be required to disclose his identity.

The Court denied the Motion for the Bill of Particulars in all respects. (R. 3, 4)

EVIDENCE.

The evidence consisted of the testimony of four Government witnesses; Agent Norris M. Durham of the Federal Narcotics Bureau (R. 6-82); Chicago Police Officer Bryson (R. 83-104); Chicago Police Officer Sims (R. 105-116), and Federal Narcotics Agent Fields (R. 116-130).

Agent Durham described two meetings between the four Government witnesses and an individual described as "John Doe" on August 12, 1954, at 75th and Prairie Avenue in Chicago, Illinois (R. 7, 8). He stated that after the second of these meetings, which was at about

9:30 P.M., Detective Bryson climbed into the trunk of a Cadillac sedan which was owned and driven by "John Doe". A strip of metal was inserted into the trunk of the car so that it would not lock. "John Doe" then drove his Cadillac to a point at 70th Place and St. Lawrence Avenue, and at about 10:00 P.M., the Cadillac was parked in a position where it was in view of the other agents and officers, with Bryson remaining in the trunk and "John Doe" at the wheel. Bryson remained concealed in the trunk from 10:00 P.M. to 11:05 P.M. (R. 14-16).

Durham testified that at this time the petitioner, Roviaro, accompanied by an unknown man in a 1951 Pontiac sedan arrived at the corner and that Roviaro entered the Cadillac and took a seat next to the driver, "John Doe" (R. 16).

The witness then described a circuitous route of travel by the Cadillac to a point west of Champlain Avenue on 74th Street in Chicago. The witness stated that he had followed the Cadillac in a Government automobile in which he was the lone occupant, and that when "John Doe" stopped the Cadillac he left the Government car and continued to watch the Cadillac. The witness said that he then saw the petitioner leave "John Doe's" Cadillac, walk a few feet to an adjacent tree, where the petitioner bent over and picked up a small package which was dark in color. The witness said that he saw the petitioner turn and walk back to the Cadillac, the right front door of which was open, and make a motion as though leaving a package in the car. Durham said the petitioner then waved to "John Doe" and walked away from "John Doe's" Cadillac. These observations were made by the witness from a point about 100 feet away in the night-time between 11:00 and 12:00 P.M. (R. 17, 18).

The witness Durham said that he watched Roviaro, the petitioner, walk away from "John Doe's" Cadillac, and stated that he thereupon went to the Cadillac and in the presence of "John Doe", seated in the front seat at the driver's wheel, picked up a small package from the metal stripping on the floor of the front seat compartment, this strip being part of the door frame. The witness said that he then followed Roviaro to the street corner immediately West of this occurrence and saw him enter the Pontiac sedan, previously described, and ride away. On Durham's return to "John Doe's" Cadillac he found Officer Bryson sitting with "John Doe" in the front seat (R. 18-20). The witness identified Government Exhibit 2 (R. 19), a sheet of purple paper, as the wrapper of the package he had found in the Cadillac sedan and stated that it contained three cellophane envelopes, which later testimony showed contained a white powder, and it was stipulated later in the evidence, that a Government chemist, if called as a witness, would testify that this white powder was partly heroin (R. 31, 32).

According to Durham he met with Agent Fields and Police Officers Bryson and Sims at 69th and Cottage Grove shortly thereafter, at which time they conducted a field test on the contents of the package that the witness testified he had recovered. Thereafter, sometime after midnight, Officers Bryson and Sims and the witness went to the front door of the petitioner's home, several miles away from the occurrence, and rang the door bell. The petitioner answered the door bell in pajamas. Upon their demand for entry, the petitioner admitted the officers, and they placed him under arrest. After examination of his home and his money, they took the petitioner to a police station at 11th and State Streets in Chicago. The exam-

ination of the petitioner's home did not disclose the presence of any narcotics or other contraband (R. 24).

During his direct examination, in the course of introducing the exhibits, containing and pertaining to the narcotics, which Durham said he had recovered from "John Doe's" Cadillac, the witness Durham identified Exhibit 6 (R. 30) as an evidence envelope, into which the narcotics had been placed after seizure and examination. This envelope, upon its face, bears a form upon which entries were made describing the case, the contents and the manner in which the narcotics were acquired by the Government. This exhibit is certified as part of the record in this proceeding and is bound in the Transcript of Record immediately after the transcript of evidence (R. 131).

This Exhibit 6 (R. 131) has, entered upon it, the Treasury Department Case No., the name and address of the petitioner, a description of the heroin which it contained upon production at trial; and immediately following the printed words, "How Obtained," it bears the entry "Found by Officer James L. Bryson," "74th & St. Lawrence Ave., Chicago, Illinois, August 12, 1954, Time 11:15 P.M." Opposite the printed words "Amount Paid" there is an entry "None." The witnesses are shown as J. T. Fields, N. M. Durham, J. L. Bryson and G. T. Sims. The envelope further shows the agent reporting the case to be Norris M. Durham. Under the "Remarks" there is an entry stating "Ex. #1, weighed and sealed by Agent J. T. Fields, in the presence of Agent Durham, and delivered to the U. S. Chemist, Chicago, Ill., for analysis." On the reverse side of the envelope are two locking devices, and the handwritten entry "Weighed and Sealed, 2 oz. 389 grs. Heroin, Aug. 13, 1954, By J. T. F., witnessed 8/13/54 NMD."

On cross-examination the witness Durham stated that the only account he could give for the fact that Government Exhibit 6 contained the handwriting of Agent Fields to the effect that the package of heroin, which is the alleged subject of the offense charged, was found by Officer James L. Bryson at 74th and St. Lawrence Avenue, Chicago, Illinois, was that it must be an error on the part of Agent Fields (R. 49). He admitted that he had placed his initials upon the envelope, Government Exhibit 6, after Agent Fields had written the notation mentioned, and that the notation was inconsistent with his testimony (R. 49).

The witness further admitted that a conversation with the petitioner, which began prior to arrival at the police station, continued for some three or four minutes at the police station, and that during that conversation the man referred to as "John Doe" stated that he did not even know Roviaro, the petitioner. The Court struck this statement from the record (R. 52, 55).

The witness further admitted on cross-examination that he found no evidence of narcotics or contraband money in his examination of the home of the petitioner or upon his person. He further stated that the packages involved were examined for fingerprints and that neither the petitioner's fingerprints nor those of any one else were found upon the packages (R. 73).

Cross examination as to "John Doe's" identity or correct name was denied (R. 40-43).

Police Officer Bryson, called as a witness on behalf of the Government, stated that he was a Chicago Police Officer. He described a meeting with Durham, Sims and John Doe at 75th and Prairie Avenue at 5:00 P.M. on August 12, 1954, and stated that the Cadillac, which John Doe

was driving, was searched and that the person of John Doe was searched (R. 85).

The witness Bryson testified that he remained in the trunk of the Cadillac, driven by John Doe, from 10:00 P.M. on August 12th until 5 or 6 minutes after 11:00 P.M. At about 7 or 8 minutes after 10:00 P.M. someone got into the Cadillac and according to the witness, spoke to John Doe (R. 88). Over objection, this witness testified to conversation, which he said he heard from the trunk, between Joe Doe and a person in the front seat, while the car was in motion on the circuitous route described by Agent Durham.

The Court stated, at this point, "I think it is subject to objection unless the witness can testify he is familiar with the voice of the party in question." (R. 89). The conversation appears at Pages 90 and 91. The witness did not testify at any time that he was familiar with or knew the voices of John Doe or of the person who was the other party to the conversation.

Officer Bryson further testified that after the arrest of the petitioner, the petitioner was placed in a seat of an automobile, between Agent Durham and the witness Bryson and that conversation between the three (3) then occurred, during which Officer Bryson told the petitioner "We're going to put you down in this tank and let you see how these dope fiends live." He was further permitted to testify, over objection, that the petitioner had said that he knew nothing about any connection and said that he did not want to get anyone else in trouble. Bryson further said that the petitioner said "You got me." and "I've stood up twice before and I can stand up again." (R. 93).

On cross examination, Bryson stated that in continued conversation with the petitioner, at the Police Station, John Doe stated that he did not know the petitioner and had never seen him before.

Objection was sustained to cross examination as to the true name of John Doe and as to whether he was dead or alive.

George T. Sims testified on behalf of the Government that he was a Chicago Police Officer. He testified to the meetings on August 12, 1954 at 75th and Prairie Avenue and to the search of John Doe (R. 107).

The witness Sims stated that he saw Roviaro get into the parked Cadillac, driven by John Doe, in which Officer Bryson was concealed in the trunk (R. 108). The witness then said that he and Agent Fields followed the Cadillac in a separate car from that of Agent Durham, but did not follow it to the point where Agent Durham claimed to have seen the petitioner pick up a package from the ground (R. 109). He said that they did later see Roviaro board the Pontiac sedan near 74th and St. Lawrence and ride away.

Cross examination was denied on the subject of the identity of John Doe (R. 113, 114). Officer Sims said that John Doe remained in custody in the Police Station over night. The witness said that he did not know whether any charge was ever filed against John Doe and that he had never been called upon to testify against him; that he had seen John Doe a half a dozen times and that the last time was around Christmas (R. 116). Officer Sims appeared as a witness before the Grand Jury, but did not reveal John Doe's correct name to the Grand Jury (R. 116).

Agent Fields, a Federal Narcotics Agent, testified on behalf of the Government that he was present at the second (2nd) meeting of the Officers and John Doe at 75th and Prairie Avenue, at about 9:30 P.M. on August 12, 1954. He said that Agent Durham and he searched the interior of the Cadillac automobile which John Doe was driving, and that he saw Officer Bryson get into the rear trunk compartment of this car. He also stated that there was a search of the person of John Doe by Officer Sims and Agent Durham at this time (R. 118). This witness said that he saw the petitioner Roviaro get into the Cadillac, driven by John Doe. He did not see any alleged transfer of any package or material from the petitioner to any other person.

On cross examination, he stated that the information, which he wrote upon Government Exhibit 6 (R. 131), to the effect that the material enclosed (narcotics) was found by Officer James L. Bryson at 74th and St. Lawrence, was given to him by Agent Durham on August 13th (R. 123). He further stated that he was in several discussions and conferences with Bryson, Durham, Sims and John Doe from the time he had left 74th and St. Lawrence until he arrived at 11th and State Street, and that they did discuss the matters involved. He stated that he was told that nothing was paid in the transaction as it was described to him (R. 124).

Cross examination to the true identity of John Doe was denied upon objection by the Government (R. 125). The witness said that Exhibit 6 was not an official Government report, and that he considered the official report as a written report, prepared after the conclusion of an investigation, that there were other reports, written by Agent Durham, with regard to this transaction, but the witness did not know whether they coincide with the statement

by Durham to the witness Fields that the narcotic material was found by Officer Bryson at 74th and St. Lawrence Avenue (R. 126).

Counsel for the petitioner, at this point, requested Agent Durham's written statements and the Court sustained the Government's objection to such production (R. 127, 128).

It was stipulated that if the Government Chemist was called, he would testify that Government Exhibits 8, 9 and 10 contained material which assayed as 80.3 percent heroin and 6.4 percent morphine.

SUMMARY OF ARGUMENT.

I.

Contrary to the decision below, the activity of "John Doe", was more than that of a mere informer, and he was, in fact, an active principal participant in all of the events upon which the prosecution was predicated and upon which the conviction on either count was secured. His conduct permeated all of the events relied upon for conviction and under the evidence he was a participant in any alleged receipt, concealment, purchase and facilitation of transportation and concealment of narcotics in violation of Section 174, Title 21, U.S.C., relied upon for conviction under Count II.

Under *Portomene* v. *United States*, (C.A. 5), 221 F. 2d 582; *Sorrentino* v. *United States*, (C.A. 9), 163 F. 2d 627; and *United States* v. *Conforti*, (C.A. 7), 200 F. 2d 365, the identity of "John Doe" should not have been withheld from the petitioner.

The refusal to disclose the identity of "John Doe" by a bill of particulars before trial, and the recurring and complete denial of cross-examination concerning his identity, prevented a fair trial. The petitioner was denied the right of cross-examination on this material matter, and was effectively prevented from securing compulsory process for a witness in his favor (R. 95).

The denial of the motion for particulars, and of all information regarding the identity of "John Doe" infringed upon the defendant's right to be informed of the nature and cause of the accusation in violation of the Sixth Amendment, under the erroneous doctrine that where the indictment is sufficient under Rule 7(c), a bill of particulars is not the right of a defendant.

II.

Where a Government witness is contradicted upon a material matter by another Government witness, and by a writing upon an exhibit, and it appears that the witness who has been contradicted has made other extra-judicial written statements concerning the event in question, then a demand by the defendant for inspection of the extra-judicial writings of the questioned witness should be granted (R. 126-128). *Gordon* v. *United States,* 344 U.S. 414; *United States* v. *Krulewitch,* (C.A. 2), 145 F. 2d 76, 79; *United States* v. *Andolschek,* 142 F. 2d 503, 506; and *United States* v. *Coplon,* 185 F. 2d 629, 638.

III.

The statute involved in Count 2 of the indictment requires fraudulent and knowing conduct as an essential of violation (Section 174, Title 21, U.S.C.). The Count of the indictment involved charges knowing and fraudulent conduct (R. 2).

The authorization of conviction where possession by the defendant is proved, unless the defendant explains the possession to the satisfaction to the jury, must be construed to mean knowing and fraudulent possession, and the statute would be invalid because unreasonable and irrational if any unwitting possession of a package containing narcotics, without knowledge of its contents, and fraudulent purpose can sustain conviction. *Tot* v. *United States*, 319 U.S. 463, 467, 468. In the case at bar there was no proof of knowledge by the petitioner of the existence of any narcotics in the alleged transaction prosecuted.

ARGUMENT.

I.

The refusal of disclosure of the identity of "John Doe" an active principal participant in the transaction prosecuted, and the name as such in the indictment, deprived the petitioner of a fair trial; and denial of particulars concerning his identity vitiates Rule 7(f) of the Federal Rules of Criminal Procedure and infringed upon the petitioner's constitutional rights to be informed of the nature and cause of the accusation, and to have compulsory process for obtaining witnesses in his favor.

The indictment in this case contained two counts, both of which were based upon a single occurrence or transaction which the evidence indicates occurred completely between 11:00 and 12:00 P.M., on August 12, 1954. A single alleged transaction in narcotics was prosecuted in two counts because such a transaction as alleged would be violative of two separate statutes enacted by Congress, to-wit: Section 2554(a), Title 26, U.S.C.; and Section 174, Title 21, U.S.C. The first count of the indictment charged a sale of narcotics by the petitioner to "John Doe" on August 12, 1954, at Chicago, Illinois; and the second count charged that at the same time and place the petitioner did fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation of a quantity of narcotic drug, knowing the same to be imported into the United States contrary to the law.

The petitioner made a prompt and timely request for particulars, in which he asked for the name, address and occupation of the person described as "John Doe" in the

indictment. The request for particulars was denied in all respects. The evidence of the Government showed that the person described in the indictment as "John Doe" and referred to by the Government witnesses throughout the trial, as "John Doe", was, in fact, an informer set up by the Government agents for the purposes of the offense prosecuted (R. 52).

The Government's evidence further showed that this informer, "John Doe", was more than a mere informer, that he was, in fact, an active principal participant in all of the events upon which the prosecution was based. The acts prosecuted by the Government in this case could not have been described without detailed testimony concerning the actions and conduct of "John Doe". No guilty conduct by the petitioner was described by any Government witness as having occurred prior to the petitioner's entry into the Cadillac automobile driven by "John Doe" on the night in question. The conduct relied upon for conviction, thereafter, consisted of the petitioner's ride as a passenger in the automobile driven by "John Doe" through the streets of Chicago to the point where the alleged transfer of narcotics occurred. At this point the petitioner left the automobile of "John Doe", and in full view of "John Doe" is alleged to have picked up a small dark package and presumably to have placed that package in "John Doe's" automobile at a place adjacent to where "John Doe" was sitting and within his reach. According to the witnesses, the petitioner then walked away from the automobile of "John Doe" leaving the package in "John Doe's" possession and control. Within seconds thereafter a package containing narcotics was recovered from "John Doe's" presence in his automobile by some agent or officer acting for the Government.

It is submitted that it is absurd to contend that "John Doe" was not a participant in the alleged activities of the petitioner relied upon for conviction under Count II of the indictment charging receipt, concealment, purchase and facilitation of transportation and concealment of narcotics.

There is no evidence to indicate the means whereby the package picked up by the petitioner was deposited in the parkway adjacent to the point where "John Doe" had driven his Cadillac automobile.

The Court of Appeals below has based its decision upon its conclusion at page 2 of its Opinion (R. 142) "John Doe" had nothing to do with the defendant's illegal possession or carriage of the package; he was not a participant in any sense of the word, in defendant's procurement and transportation of the package."

It is respectfully submitted that this holding by the Court of Appeals as a basis for decision, is a highly unreasonable construction of the status of "John Doe" in the event described by the Government's witnesses. It appears to be an adoption by the Court of Appeals of the desperate reasoning urged by the Government upon appeal, when it was recognized that reversible error had occurred by reason of the denial of the bill of particulars and the refusal to allow cross-examination concerning the identity of "John Doe". Was not "John Doe" an aider and abettor, or a conspirator acting in concert in the most indulgent view of the Government's evidence?

Of course, no one can gainsay the fact that "John Doe" was a person whose testimony could have thrown substantial light upon the events relied upon for conviction under each Count. The very failure of the Government to call this active participant in the affair indi-

cates that his testimony would have been favorable to the petitioner. This man, whose identity was concealed from the trial of facts and from the petitioner and, therefore, could not be the subject of subpoena by the trial Court or by the petitioner as a witness in the petitioner's favor, was an informer whom the Government had peculiarly within its power to produce. His testimony, without question, would have elucidated the transaction involved in both Counts. This gives rise to the presumption that his testimony would be unfavorable to the Government.

The following quotation is from *Scanlon* v. *United States*, 223 F. 2d 382 at 392, an opinion by Judge Hartigan of the Court of Appeals for the First Circuit, dated June 13, 1955:

> "In *Graves* v. *United States*, 1893, 150 U.S. 118, 14 S.Ct. 40, 37 L. Ed. 1021, the Supreme Court, although reversing a conviction because of prejudicial comment by the district attorney, stated at page 121 of 150 U.S. at page 41 of 14 S. Ct.: 'The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.' This rule has been generally followed and consequently comments on the non-production of evidence which is peculiarly within the control of the other party have been allowed. 88 C.J.S., Trial, § 184; *Chesapeake & O. Ry. Co.* v. *Richardson*, 6 Cir., 1941, 116 F. 2d 860, certiorari denied 313 U.S. 574, 61 S. Ct. 961, 85 L. Ed. 1531; *Milton* v. *United States*, 1940, 71 App. D.C. 394, 110 F. 2d 556; See *Bell* v. *United States*, 4 Cir., 1951, 185 F. 2d 302, 309, certiorari denied 340 U.S. 930, 71 S. Ct. 492, 95 L. Ed. 671."

While the Government's fear for the disclosure of the identity of "John Doe" strengthens and bolsters to a conclusive degree the presumption that unidentified and missing "John Doe's" testimony would be favorable to the petitioner, the testimony of a Government witness is even more convincing.

Pages 94 and 95 of the Record contain the admission by Police Officer Bryson that "John Doe", when confronted by the petitioner, said that he did not know the petitioner and had never seen him before. This is the "John Doe" described by all witnesses as the driver of the Cadillac and the active participant in the acts prosecuted. Under the facts in this case the petitioner was deprived of information as to the nature and cause of the accusation by the denial of a bill of particulars. The denial of the right to cross-examine each of the Government witnesses as to the true identity of "John Doe" compounded this prejudicial error and worked destruction on the petitioner's right to a fair trial and due process of law (R. 9, 40, 103, 113, 116, 125, 126).

The Court of Appeals for three Circuits have passed upon the suppression of the identity of informers who were also active participants in the events prosecuted.

In *Sorrentino* v. *United States,* (C.A. 9) 163 F. 2d 627, it was held that the denial of information as to the identity of an active participant in the transactions prosecuted was error. However, since the record showed in that case that it was clear that the defendant knew the name of the informer, and that sufficient testimony established this beyond doubt, no prejudice arose, and therefore reversal was not required. In the case at bar the Government cannot point to the record and claim that the petitioner knew the name or identity of the informer.

United States v. *Conforti*, 200 F. 2d 365, is a decision of the Court of Appeals for the Seventh Circuit, which Court also decided the case at bar. In that case the Court of Appeals held that it was error to deny cross-examination as to the identity of an active participant informer but discovered that the identity was not actually requested. The Court said that had the proper questions been asked, the denial would have been prejudicial. In the case at bar, every one of the four Government witnesses were specifically asked for the true name of "John Doe" upon cross-examination, and in every case the Government's objection to such cross-examination was sustained.

The Court of Appeals for the Fifth Circuit recently decided the case of *Portomene* v. *United States*, 221 F. 2d 582. This decision discussed the *Conforti* and *Sorrentino* decisions, and reversed a conviction in a narcotics case because the defendant was deprived of information concerning the identity of an active principal participant, who also happened to be an informer.

The petitioner here respectfully urges that the decision in *Portomene* v. *United States*, (C.A. 5) 221 F. 2d 582, is a proper decision completely appropriate to the issues in this case, and it is urged that the decision of the Court of Appeals below, from which review is asked, is contrary to the decision in *Portomene* v. *United States*, 221 F. 2d 582, and that the conflict between the two decisions with the obvious difference in results, is apparent despite the attempts by the Government and the Court of Appeals below to distinguish this case from the *Portomene* decision. In the case at bar the Court of Appeals below has arbitrarily stated that it is not disputed that "John Doe" was not a participant in the petitioner's illegal possession charged in Count II. It

is apparent from the facts in the case at bar that this is not true.

Despite the fact that the petitioner did not take the stand in the case at bar, his case was submitted to the trial Court for decision upon his plea of not guilty. The Government's evidence showed that "John Doe" had the best position and opportunity for determination of the identity of the person who sat next to him in his Cadillac, and who retrieved a package of narcotics from the ground adjacent to "John Doe's" Cadillac and allegedly left it with "John Doe" in his Cadillac car, and he stated that the petitioner was unknown to him and that he had never seen him before (R. 95). This statement by "John Doe" was within an hour or two of the occurrences prosecuted. So it would appear that under any view of the evidence the petitioner's "position" was in dispute, even following the evidence of the Government agents.

The disclosure of "John Doe's" identity, which would have made possible his production of the witness, could have raised serious doubt as to whether any "possession" of any character had been found in the petitioner. It is obvious that the petitioner's defense was substantially prejudiced in so far as both counts were concerned because "John Doe's" participation in both alleged offenses was unquestioned and permeated the entire evidence relied upon to establish petitioner's culpability.

It is respectfully suggested that this conviction should be reversed upon authority of *Portomene* v. *United States*, 221 F. 2d 582, despite the efforts of the Court below to distinguish it from the case at bar.

Suppression of the informer's identity, without adequote justification, prevented the petitioner from produc-

ing him as a witness to give the favorable evidence indicated by his denial that he had carried on any transaction with petitioner, or knew him (R. 95). Issuance of a subpoena for "John Doe", without address or description, would be ridiculous and useless. The petitioner was denied the right to compulsory process for a specific witness in his favor by the trial court's support of the Government's concealment of this important participant witness whose testimony could have been vitally important.

It is further respectfully urged that the Federal Rules of Criminal Procedure suggest and contemplate sound exercise of liberal discretion in the issuance of bills of particulars for the purpose of affording the defendant fair notice of the nature and cause of the accusation against him, which may not be included or contained in "a plain, concise and definite written statement of the essential facts constituting the offense charged." It is clear that an indictment may conform to the foregoing quotation from Rule 7(c) of the Federal Rules of Criminal Procedure and yet not afford a defendant fair notice of the nature and cause of the accusation. Such indictment is no more than "notice pleading". Among the safeguards provided for a defendant under such circumstances by the Rules of Criminal Procedure is an application for a bill of particulars. It would appear that the Court below, in the case at bar, have fallen into the error of considering that since the indictment met the requirement of "a plain, concise and definite written statement of the essential facts constituting the offense charged", (Rule 7(c)), therefore the grant or denial of a bill of particulars was a matter of whim, or desirability on the part of the prosecutor or trial Court rather than the considered, sound, liberal, exercise of discretion affording the constitutional right of the defendant to be informed of the nature and cause

of the accusation in accordance with the Sixth Amendment to the Constitution of the United States. Mere technical sufficiency of an indictment in short and streamlined form should not support denial of a request for a bill of particulars, but should indicate, on the contrary, the necessity therefor, in order to afford the defendant a fair trial, as required by due process of law, and the Sixth Amendment.

The elimination of the bill of particulars under the Federal Rules of Civil Procedure and the substitution therefor of "a motion for more definite statement" under Rule 12(e) of the Federal Rules of Civil Procedure, has been justified in most quarters by the existence of generous discovery procedures contained in Rules 26 to 37 of the Rules of Civil Procedure. However, in criminal cases the most effective of these discovery procedures is not available. The deposition process, for instance, is not available to the defendant in a criminal case, under all ordinary circumstances, in contrast to the aids and safeguards afforded the civil defendant under Rules 26 to 37 of the Civil Rules of Procedure. Rules 16 and 17 of the Federal Rules of Criminal Procedure are not an adequate or parallel protection for the defendant in a criminal case, denied proper particulars, where he has been charged in "plain, concise and definite" language of the statute, with no more factual detail.

A more important and fundamental reason for the grant of a bill of particulars, lies in the fact that the Sixth Amendment to the Constitution of the United States provides for the right of the accused "to be informed of the nature and cause of the accusation".

It is respectfully submitted that since it has been generally held that the statement of an offense in the language of the statute, as in the case at bar, would constitute

a sufficient indictment, only an indulgent and generous grant of particulars will afford to defendants the protection which is their right under the Sixth Amendment.

The Court is asked to hold that the denial of the bill of particulars in the case at bar was specific reversible error, and thus indicate some curb upon the growing practice of denying particulars because the indictment is held to be sufficient under Rule 7(c) of the Federal Rules of Criminal Procedure. It is respectfully submitted that the denial of the bill of particulars in the case at bar and the continued refusal to disclose information necessary and pertinent to the preparation or presentation of defense was a violation of the petitioner's rights under the Sixth Amendment, as well as being contrary to the decisions cited heretofore.

II.

The denial of the petitioner's request for production of written statements and reports of an agent witness, who was proved to have made oral statements to an associate which contradicted his testimony on a crucial issue, was reversible error.

A substantial question concerning the truthfulness and accuracy of Agent Norris Durham and Officer Bryson developed when it appeared that Government Exhibit 6, an official evidence envelope, which was transmitted as part of the Record in this case, contained a notation that the narcotics involved in the case were "Found" by Officer Bryson rather than recovered by Agent Durham. This evidence contradicted the sworn testimony given by Agent Durham and Officer Bryson as Government witnesses.

Agent Fields testified that he had made the entries on Exhibit 6, and that Agent Durham gave him the in-

formation that the narcotics had been found by Officer Bryson on August 13, the day following the date alleged in the indictment (R. 123). Examination of Exhibit 6, (R. 131), shows that Durham placed his initials on the reverse side of the envelope, a d he testified that he had done this after the face of the envelope had been filled in. This statement on Exhibit 6 was contradictory of his evidence, by his own admission (R. 48, 49), and his only reason or explanation was mistake.

Agent Fields testified that there were other reports written by Agent Durham concerning the transaction which was the subject of the prosecution. He stated, however, that he did not know whether Agent Durham's written reports coincided with Duham's oral statement to Fields concerning the manner of acquisition of the narcotics involved (R. 126).

At this point counsel for petitioner requested permission to see Agent Durham's written statements concerning the transaction. The prosecutor stated that he did not have Durham's written statements with him in Court and asked if they could be produced the following morning (R. 127). The trial Judge stated "We are going to conclude this case today, gentlemen." After considerable argument the Court denied the request for production of these statements (R. 128).

If Agent Durham did not tell the truth concerning the finding of the package, then his entire story in its important parts is shattered. Certainly his testimony on this was material, in fact crucial. If he did not find the package in "John Doe's" automobile, what happens to the inference that it is the same one picked up by the petitioner? Did Durham substitute or confuse another package given him by Bryson? Did he forget the facts of the transaction prosecuted?

Certainly his written reports should elucidate or throw light on this point. Inspection of these reports, the existence of which was established by Agent Fields' testimony, would permit a determination of whether Agent Durham had made *additional* extra-judicial statements at variance with his sworn testimony. If these contradicted or varied from his testimony, the trial Court's and probably any Court's confidence in his testimony might be affected to a point where his entire testimony must be disregarded. He was not corroborated on the deposit of any package in "John Doe's" car, or on his testimony that he found it. He was impeached on this point by extra-judicial statement to Agent Fields (Ex. 6) (R. 131). The only possible fully corroborating witness was concealed and withheld from the Courts and the petitioner, by the Government, despite repeated and proper efforts of the petitioner, to secure disclosure.

It is respectfully submitted that in *Gordon* v. *United States*, 344 U.S. 414, the foundation laid for a request for production of documents was only slightly different, in facts, but is not distinguishable in principle.

In the case at bar the record shows by Agent Fields that the documents (Agent Durham's statements) were in existence, were in possession of the Government, were made by the witness whose credibility was in question; that the witness had made extra-judicial material statements contrary to his testimony, and the contradiction was on a relevant, material and important matter which directly bore on the main issue being tried, to-wit, did the petitioner deposit a package of narcotics in "John Doe's" auto, in "John Doe's" presence; and was that the package recovered by Durham from "Joe Doe's" presence and automobile or was Durham inaccurate or untruthful in his uncorroborated testimony?

The Court is asked to consider *Asgill* v. *United States*, (C.A. 4) 60 F. 2d 776; *United States* v. *Krulewitch*, (C.A. 2) 145 F. 2d 76, 79; *People* v. *Davis*, 52 Mich. 569, 18 N.W. 362; *People* v. *Bachman*, 41 Nev. 197, 168 P. 733; *People* v. *Schainuk*, 286 N.Y. 161, 164, 36 N.E. 422. These were said to be highly respectable authority in state and lower federal courts in support of the view that an accused is entitled to production of such documents, in the unanimous opinion of the Supreme Court in the *Gordon* case, 344 U.S., 414, 419.

See also *United States* v. *Andolschek*, 142 F. 2d 503, 506, and *United States* v. *Coplon*, 185 F. 2d 629, 638.

The petitioner, as his conclusion on this point, adopts this quotation from *Gordon* v. *United States*, 344 U.S. 414, 419:

> "Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that 'The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony untrustworthy persons'. (*People* v. *Davis*, 52 Mich. 569, 573, 18 N.W. 362)."

III.

The decision of the Court of Appeals that ANY possession of narcotics, even without knowledge, will justify conviction under Section 174, Title 21, U.S.C., is erroneous.

The Court of Appeals below has justified its affirmance of this conviction on the second count only, because under the Statute there involved, Congress has prescribed that possession of a narcotic drug shall be sufficient to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury (Sec. 174, Title 21, U.S.C.A.). (R. 142, 143)

The Count involved *charges* that the petitioner did *knowingly* and *fraudulently*, receive, conceal, buy and facilitate the transportation after importation of a quantity of narcotic drug, *knowing* the same to have been imported contrary to law. (R. 2) *United States* v. *Carll*, 105 U.S. 611, 26 L. Ed. 1135.

It is submitted that it cannot have been the intention of Congress to authorize conviction regardless of whether the petitioner was afforded a fair trial, if only the Government produced some evidence which might support an inference of any kind of possession. It is the petitioner's contention that substantial trial errors which infringe upon or deprive the accused of Constitutional rights, certainly could cause reversal in such a condition.

However, the petitioner further contends that the statutory authorization of *conviction* unless *the defendant* explains to the satisfaction of the jury, certainly is not properly based upon any illusory, fleeting possession, or, even upon an actual possession of a package which the circumstances in the evidence fail to show is a knowing possession of narcotics. It is far more than a mere evidentiary presumption, for who is to say what *explanation* by a *defendant*, on such a scandalous charge would *satisfy* a jury of twelve.

The question with which petitioner was faced at close of the Government's case, was whether conscious and knowing physical handling of a package containing contraband, without proof of knowledge of the contraband contents, can support and trigger into effect a statutory authorization of conviction of a knowing and fraudulent act. The Court below adopts the position that any type of possession will do.

In the case at bar there is no evidence in the record to support a contention that the petitioner had knowledge

of the contents of the package during the momentary handling of it by him. According to the Government's evidence he procured it from the adjacent ground for "John Doe" who remained in his Cadillac next to the place where the package was found, and his fleeting possession was for only the time it took to step back to the undisclosed informer's car.

If the petitioner did not know what was in the package, and no evidence shows that he did, then it is illogical and irrational to authorize his conviction of knowing and fraudulent possession of narcotics. It is suggested that the mere handling or possession of a harmless appearing package which gives no indication of its contents will not support the conclusion that a temporary handler or possessor has knowledge and purpose sufficient to convict. Otherwise the presumption of innocence has been destroyed, and the burden of proof beyond a reasonable doubt has been reduced to a shadowy feather.

It is a far more rational and reasonable conclusion to believe that the purpose of the statute was only to presume that *knowing* possession of narcotics would authorize conviction because of the presumption that the knowing possessor acknowledged that the narcotics were illegally imported, unless he explained lawful importation or legally authorized possession. This inference of the knowledge that the narcotics were illegally imported is reasonable and consistent with human experience. It was not contended by the Government in the Court below, that the evidence sustained in any degree a conclusion that the petitioner knew the contents of the innocent appearing package handled by him to have been narcotics, in the absence of indulgence in presumption. The Court of Appeals, in its opinion, has taken the position that proof of knowledge and fraudulent purpose are

unnecessary. Cf. *United States* v. *Di Re*, 332 U.S. 581, 593; and *Tot* v. *United States*, 319 U.S. 463, at 469.

In discussing possession in a stolen property case Mr. Justice Minton of the Supreme Court, while a Judge of the Court of Appeals for the Seventh Circuit, said in *United States* v. *Wainer*, 170 F. 2d 603 at page 606, "To 'possess' means to have actual control, care and management of and not a passing control, fleeting and shadowy in its nature. *State* v. *Cooper*, Mo. App., 32 S.W. 2d 1098, 1099."

The Supreme Court of the United States has said, "Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding. See Thayer, Preliminary Treatise on Evidence (1878) cc 8 and 9; Wigmore, Evidence 3d ed. §§ 2490-2540; Morgan, Some Observations Concerning Presumptions (1931) 44 Harvard L. Rev. 906; Denning, Presumptions and Burdens (1945) 61 Law Quart. Rev. 379." (*Bollenbach* v. *United States*, 326 U.S. 607, 614).

In *Tot* v. *United States*, 319 U.S. 463, at Pages 467 and 468, the Supreme Court of the United States discusses the validity of legal presumptions, or presumptions of evidence as prescribed by State Legislature or the Congress of the United States. It hold that in every instance they must be reasonable and "cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the one in common experience". It is not reasonable to assume everyone knows the contents of any package he handles. On the other hand, if knowledge that the package contains narcotics is proved, knowledge of unlawful importation may be presumed reasonably.

It is respectfully submitted that the inferred and presumed, fleeting and shadowy possession established in the record in this case is an improper and unlawful basis upon which to trigger into effect a statutory presumption and rule of evidence relied upon by the prosecution.

In any event, it is clear and unequivocal that "John Doe" was a full, active participant, under the evidence, in all phases of the transaction and "possesion" relied upon. Under these circumstances, it was plain reversible error to deny the defendant a fair trial by refusal to disclose the identity of "John Doe" in a bill of particulars, properly requested, and to deny proper cross-examination of the Government witnesses concerning the identity of "John Doe", and to hinder and prevent the petitioner from securing a witness in his behalf.

See Justice Roberts' discusion of *Yee Hem* v. *United States*, 268 U.S. 178, 69 L. Ed. 904, and *Casey* v. *United States*, 276 U.S. 413, 72 L. Ed. 632, in the *Tot* decision, 319 U.S. 463, at pages 471 and 472. It is suggested and urged that the petitioner must be *proven to know* that he has possession of narcotics, and that then a presumption of knowledge that it was unlawfully imported takes effect, and authorizes conviction.

As interpreted below, the statute destroys the presumption of innocence, removes the burden of proof on an essential element of the offense, prescribed by statute and charged in the indictment, and places upon the accused a burden of proving his innocence to an indefinable standard or degree of proof, "the satisfaction of the jury".

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

MAURICE J. WALSH,
Attorney for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	10
Conclusion	14

CITATIONS

CASES:

Goldman v. *United States*, 316 U. S. 129 13
Gordon v. *United States*, 344 U. S. 414 ..... 13, 14
Hirabayashi v. *United States*, 320 U. S. 81 10
Pinkerton v. *United States*, 328 U. S. 640 10
Portomene v. *United States*, 221 F. 2d 582 ..... 10, 11
Sorrentino v. *United States*, 163 F. 2d 627 ..... 10, 11, 12
United States v. *Conforti*, 200 F. 2d 365 ..... 10, 11
United States v. *Feinberg*, 123 F. 2d 425, certiorari denied, 315 U. S. 801 11
United States v. *Li Fat Tong*, 152 F. 2d 650 11

STATUTES:

21 U. S. C. 174 3
26 U. S. C. (1952 ed.) 2554(a), now 26 U. S. C. 4705(a) 2

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 827

ALBERT ROVIARO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-5a) is reported at 229 F. 2d 812.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1956 (Pet. App. 6a). A petition for a rehearing was denied on March 7, 1956 (Pet. App. 7a). The petition for a writ of certi-

orari was filed on April 6, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for a violation of 21 U.S.C. 174, based upon possession of heroin which was proved by the testimony of two officers who observed petitioner handle a package of the drug, was invalid because the government was allowed to withhold the identity of an informant who was also present at the transaction but who was not called to testify.

2. Whether the trial court properly refused to order production of a report made by a narcotic agent to his superiors when the basis for the request was that a notation on the envelope in which the heroin was kept, made by an officer not present at the time, was to the effect that officer Bryson had found the narcotics, whereas the testimony of the officers at the trial was that agent Durham had first retrieved the narcotics and turned it over to Bryson.

STATUTES INVOLVED

26 U.S.C. (1952 ed.) 2554(a) provided:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, ex-

changed, or given, on a form to be issued in blank for that purpose by the Secretary.

21 U.S.C. 174 provides in relevant part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

In a trial without a jury before the United States District Court for the Northern District of Illinois, Eastern Division, petitioner was found guilty upon two counts of an indictment, returned September 3, 1954, charging that (1) on August 12, 1954, at Chicago, Illinois, he sold heroin to one

"John Doe" in violation of 26 U.S.C. 2554(a) (*supra*, pp. 2-3),[1] and (2) on the same date and in the same place, he knowingly received, concealed and facilitated the transportation, after importation, of heroin in violation of 21 U.S.C. 174 (*supra*, p. 3) (R. iv-vii,[2] R. 217). Petitioner was sentenced to two years imprisonment and a fine of $5.00 on each count, the sentences to run concurrently (R. 217).

1. Before trial, petitioner filed a motion for a bill of particulars (R. ix-x) requesting the name, address and occupation of John Doe, the date and time of day, and the place of occurrence by street and number, of the alleged offense. The court denied the motion (R. xii).

At trial, the government produced evidence to show that two federal narcotic agents, Durham and Fields, and two Chicago police officers, Bryson and Sims, met together with an informant known to the police for many years (R. 70, 154), but described only as "John Doe," at 75th and Prairie Avenue in Chicago on the night of August 12, 1954 (R. 15, 138, 174, 191). Doe and his Cadillac sedan were searched (R. 15, 138, 175, 192). Bryson concealed himself in the trunk of the Cadillac (R. 17, 139, 192) and Doe drove it to

---

[1] Now 26 U. S. C. 4705(a).

[2] The numerals refer to corresponding but unnumbered pages attached at the beginning of the record before the transcript of proceedings.

70th Place and St. Lawrence Avenue, followed by Durham in a government car (R. 17, 175, 193). At this point, petitioner, driving a Pontiac sedan, arrived, accompanied by an unknown man (R. 19, 176, 193). Petitioner left the Pontiac and entered the Cadillac taking a seat next to the driver, John Doe (R. 19, 176, 193). The Cadillac then proceeded by a circuitous route to 74th Street near Champlain Avenue. When Durham saw petitioner alight from the Cadillac, he left his car and stood watching from a point about 100 feet away (R. 20-23). It was a clear moonlit night (between 11 and 12 p.m.) and the area was lit by a street light (R. 22-23, 103, 125). Durham saw petitioner walk a few feet to a nearby tree, pick up a small package, return to the open right front door of the Cadillac, make a motion as if to deposit the package therein, and then wave to John Doe and walk away (R. 23, 106-111). Bryson, peeping from the slightly raised lid of the Cadillac trunk, saw petitioner pick up the package near the tree and return to the Cadillac (R. 147).

Durham, seeing petitioner walk away, went immediately to the Cadillac and recovered a package from the floor (R. 24). He called to Bryson to come out of the trunk (R. 113) and then walked down the street in time to see petitioner reenter the Pontiac and ride away (R. 24-25). A field test of the package indicated that it contained narcotics (R. 26-27).

Shortly thereafter, at about 12:25 a.m. (R. 148), the four officers, still accompanied by John Doe, arrested petitioner at his residence, taking him in one car, and Doe in another, to the Narcotics Bureau (R. 32-39). There was testimony that Doe remained in the custody of the police overnight (R. 185).

Throughout the cross-examination of these government witnesses, repeated objections to persistent questions by counsel for petitioner as to the identity of John Doe were sustained (R. 63, 64, 97, 167, 170, 185, 204, 205). Government counsel based his objections to such questions on the ground that, prior to trial, the court had ruled that the government need not reveal the identity of the informant, and that to do so would make his services valueless to the government in other cases (R. 60-61).

Further, in cross-examination, counsel for petitioner questioned witness Durham about an alleged conversation[3] that took place in the police interrogation room when petitioner was confronted with Doe (R. 80-81). The court reserved its decision as to whether such evidence was prop-

---

[3] The evidence would have been that Durham heard John Doe say that he did not know petitioner. Counsel for the government, on redirect examination, established that Durham had seen petitioner with Doe previously, arguing, against a motion to strike, that petitioner's counsel had, through his cross-examination, put the fact of Doe's acquaintance with petitioner in issue (R. 81-84).

erly admissible (R. 42), later striking it from the record (R. 84). However, when counsel for petitioner later cross-examined Bryson, he inquired at some length about the conversation in the interrogation room, without objection from government counsel or interruption by the court (R. 153-154). He concluded by asking (R. 153-154):

> Q. Well did he [John Doe] say anything with reference to an acquaintance or any prior association with this man?
>
> A. Yes. In the presence of the Defendant, to make the Defendant—
>
> Q. Forget your purpose, now. What did he say?
>
> A. Well, he said he didn't know the Defendant here. He said he had never seen him before.
>
> Q. That was the John Doe that was sitting in the front seat of the Cadillac?
>
> A. Yes, sir.

Upon redirect examination, government counsel established that Bryson had seen petitioner meet Doe on a previous occasion (R. 165). Over objection, the court allowed the testimony to stand (R. 166).

2. The package which had been found in the car was turned over by Durham to Bryson (R. 39, 75) and then to Fields in the Narcotics Bureau interrogation room (R. 40). When analyzed, it was found to contain heroin (R. 46).

An envelope into which the heroin had been placed after seizure and examination was introduced into evidence as Exhibit 6 (R. 216). Entries made in ink upon the face of the envelope include the name and address of petitioner and a description of the contents. Opposite the printed words "How obtained" the printed words "Purchased by" are crossed out in ink, and after the printed words "Found by" there appears a notation in the handwriting of agent Fields, "Officer James L. Bryson." After the printed words "Where obtained" it is noted "74th & St. Lawrence Ave., Chicago, Illinois." The date is noted as August 12, 1954, and the time as 11:15 p.m. Opposite the printed words "Amount Paid," there is an entry "None." The names of four officers appear as witnesses, and the agent reporting the case is shown as Durham. The reverse side of the envelope, bearing the initials of Fields and Durham, indicates that the heroin was weighed and sealed by Fields while witnessed by Durham on August 13, 1954.

On cross-examination, Durham conceded that the notation on the envelope (Exhibit 6) as to how the heroin was obtained was inconsistent with his testimony, but explained that it was error on the part of Fields (R. 75-76). Fields stated that the information which he noted on the envelope was given to him by Durham on August 13th (R. 201). Fields further said that he did not consider

Exhibit 6 an "official" Government report. He said there were other reports written by Durham with regard to the transaction but that he did not know whether they were consistent with the information given him by Durham as noted on the envelope (R. 206). At this point petitioner's counsel requested that the "official" report be produced. The court sustained an objection to the request (R. 209-210).

At the conclusion of the government's case petitioner called no witnesses (R. 214) but moved for a judgment of acquittal which was denied (R. 213).

Upon appeal, petitioner asserted that the trial court committed error in denying the motion for a bill of particulars and in limiting cross examination as to the identity of John Doe, and in denying his request for the production of the report of agent Durham (Pet. App. 1a-2a). The Court of Appeals affirmed the conviction, holding that it was not necessary to decide whether John Doe was an active participant in the offense of sale charged in count 1 so as to entitle petitioner to full disclosure of Doe's identity, inasmuch as guilt under count 2 was sufficient to support the sentence, it being undisputed that John Doe was not a participant in the illegal possession on which that charge was based (Pet. App. 2a-3a). The court further found no error or abuse of discretion on the part of the trial court in denying the motion

for production of the report, holding that there was no sufficient showing of its materiality (Pet. App. 3a-5a).

ARGUMENT

1. Petitioner contends that the trial court erred in upholding the right of the government to nondisclosure of the identity of John Doe. He argues that Doe was an active participant in the illegal activity charged and that therefore the government could not withhold identity of an informant under the rule established by *Sorrentino* v. *United States,* 163 F. 2d 627 (C.A. 9); *United States* v. *Conforti,* 200 F. 2d 365 (C.A. 7); and *Portomene* v. *United States,* 221 F. 2d 582 (C.A. 5).

While we do not question the rule of those cases, we believe that, as the court below held, the conviction on count 2, based on illegal possession, may properly be upheld since the identity of the informant has no real bearing on that charge in the circumstances of this case. Since the sentences on both counts were to run concurrently, count 2 alone will support the verdict. *Hirabayashi* v. *United States,* 320 U.S. 81; 85; *Pinkerton* v. *United States,* 328 U.S. 640.

The naming of the informant could not add to or detract from the evidence as to *possession.* Both Durham and Bryson saw petitioner go to a tree, pick up a package, and carry it back to the Cadillac in which he had been riding (R. 23, 106-111, 147). Both were positive of their identification;

each had seen petitioner before (R. 5, 82-83, 135, 165); each was watching from a short distance (R. 20-23, 147) on a clear night in a well-lighted area (R. 22-23, 103, 125). The package, when analyzed, was found to contain heroin (R. 46). And petitioner's possession and carriage of the package was *prima facie* evidence of his guilt under count 2 and left him with the burden (which he declined to meet) of proving that he possessed the narcotics lawfully. *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (C.A. 2); *United States* v. *Feinberg*, 123 F. 2d 425 (C.A. 7), certiorari denied, 315 U.S. 801.[4]

John Doe's identity was not material to petitioner's defense—the test laid down by the *Sorrentino*, *Conforti* and *Portomene* cases, *supra*—unless petitioner was seriously contesting the testimony that *he* was present and participated in the transaction. But there was no such issue at the trial, and no real attempt to present a defense of mistaken identity. Petitioner now makes much of the testimony as to John Doe's statement when confronted with petitioner in the police interrogation room (most of which was stricken from the

[4] The government was under no duty to bring in as witnesses all persons who had some knowledge of the illegal activity. Further, no inference (of testimony unfavorable to to the government) can be drawn from the failure of the government to call Doe as a witness because the reason why he was not called (to protect his status as an informant) was reiterated time and time again.

record) that he did not know petitioner and had never seen him before. It is evident, however, that that statement was made to conceal from petitioner the fact that Doe was an informant, as part of a general pretense, to protect the informant and his continued use to the government. This is borne out by the evidence that the informant was kept in custody overnight (so as to make it appear he was genuinely arrested) and by the testimony which shows that Bryson, when he attempted to say *why* Doe denied knowing petitioner, was prevented from doing so by petitioner's counsel (see p. 7; *supra*). As noted above, the police had observed petitioner before the meeting in question and were positive in their identification. No defense seriously put forward by petitioner (who called no witnesses, *supra*, p. 9) required knowledge of Doe's identity or even suggested that such information would really be pertinent or helpful to the defense.

Under these circumstances, while we agree that the identity of an informant who is an active participant (or whose identity is otherwise material to the defense) should normally be disclosed, we believe that the failure to do so in this case cannot be deemed error requiring reversal of the conviction. See *Sorrentino* v. *United States*, 163 F. 2d 627, 629, *supra*, in which, although setting forth the general rule, the court held that in the facts of that case—showing that disclosure was unnecessary—non-disclosure did not require reversal. In

the analogous situation of production of official reports or memoranda made by a government witness, the rule is that a defendant cannot engage in a "fishing expedition" but must lay a proper foundation for such compulsory production by showing substantial reasons for believing that the documents will be pertinent. *Gordon* v. *United States,* 344 U.S. 414, 418-419; *Goldman* v. *United States,* 316 U.S. 129. No such showing was made here.

2. There is also no merit in petitioner's contention that the trial court committed error in refusing his request for the production of Durham's report to the Narcotics Bureau. The basis of the request was that the envelope in which the narcotics were put for safekeeping bore a notation, made by Fields who was not present at the time the package was found, that Bryson found the narcotics, whereas the testimony was that Durham first found the package in the car (with Bryson at the scene), then turned it over to Bryson, and then to Fields (See the Statement, *supra,* pp. 7-9).

The variance between the notation on the envelope and the more detailed testimony of the agents on the stand was immaterial, since Bryson and Durham were working together at the time the package was found. The slight discrepancy was fully explained by the fact that the notation was made by Fields who obtained the package the next day. Whether one agent or the other first

laid hands on the package did not affect their crucial and consistent testimony as to seeing petitioner take the package from a tree and bring it to the car. The court below was therefore correct in holding that, in contradistinction to *Gordon* v. *United States,* 344 U.S. 414, *supra,* there was in the instant case no sufficient showing that the document requested contained evidence material and relevant to the issues.

The trial judge is allowed wide discretion in the matter of compelling production of documents of this type. Under the circumstances, there was no abuse of discretion here. *Goldman* v. *United States,* 316 U.S. 129, 132.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

MAY 1956.

☆U. S. GOVERNMENT PRINTING OFFICE 1956—384465/P.O. 1391

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Summary of argument	11
Argument:	
I. Since the identity of an informant should not be disclosed unless it is material to the defense of the accused, failure to disclose the identity was not error, in the circumstances of this case, in relation to the charge of illegal possession of narcotics	17
A. It is established that the government is privileged to withhold the identity of an informant unless such identity is essential to the defense of the accused	18
B. The identity of the informant was not material to petitioner's defense on the count charging illegal possession	25
C. The exercise of the government's privilege of non-disclosure in the circumstances of this case did not deprive petitioner of any constitutional right	29
II. Petitioner's conviction under 21 U. S. C. 174 is supported by his unexplained possession of heroin	33
III. The trial court properly denied petitioner's motion for production of an alleged written report of the crime made by a federal agent to his superiors	37
Conclusion	42

CITATIONS

Cases:

	Page
Adams v. *United States*, 220 F. 2d 297	21
Aeby v. *United States*, 206 F. 2d 296, certiorari denied, 346 U. S. 885	34
Bowman Dairy Company v. *United States*, 341 U. S. 214	41
Casey v. *United States*, 276 U. S. 413	15, 34, 35
Commonwealth v. *Pomeroy*, 117 Mass. 143	19
Curtis v. *Rives*, 123 F. 2d 936	29, 30
Dowdell v. *United States*, 221 U. S. 325	30
Gates v. *United States*, 122 F. 2d 571, certiorari denied, 314 U. S. 698	31
Goetz v. *United States*, 39 F. 2d 903	18
Goldman v. *United States*, 316 U. S. 129	17, 29, 41
Gordon v. *United States*, 344 U. S. 414	14, 16, 17, 29, 39, 41
Hagner v. *United States*, 285 U. S. 427	31
Hirabayashi v. *United States*, 320 U. S. 81	18
Jencks v. *United States*, No. 23, this term	29, 41
Jordon v. *Bondy*, 114 F. 2d 599	26, 29
Kaufman v. *United States*, 163 F. 2d 404	31
Landsborough v. *United States*, 168 F. 2d 486, certiorari denied, 335 U. S. 826	34
Maloof v. *United States*, 159 F. 2d 62, certiorari denied, 331 U. S. 818	31
Marks v. *Beyfus*, L. R. 25 Q. B. D. 494	19
Mattox v. *United States*, 156 U. S. 237	30
Moffatt v. *United States*, 232 Fed. 522	39
Morton v. *United States*, 147 F. 2d 28, certiorari denied, 324 U. S. 875	26, 29
McInes v. *United States*, 62 F. 2d 180, certiorari denied, 288 U. S. 616	18
Norris v. *United States*, 152 F. 2d 808, certiorari denied, 328 U. S. 850	31
Nye & Nissen v. *United States*, 168 F. 2d 846, affirmed, 336 U. S. 613	31
Parnell Commission's Proceedings, 1888, 20th day, Times Rep. pt. 6, p. 28	19
Pinkerton v. *United States*, 328 U. S. 640	18
Portomene v. *United States*, 221 F. 2d 582	12, 20, 21, 25, 27

Cases—Continued

	Page
Price v. *United States*, 156 Fed. 950	36
Quarles and Butler, In re, 158 U. S. 532	18, 19
Regina v. *Richardson*, 3 F. & F. 693	19
Scher v. *United States*, 305 U. S. 251	18, 20
Segurola v. *United States*, 16 F. 2d 563, affirmed, 275 U. S. 106	18
Shore v. *United States*, 49 F. 2d 519, certiorari denied, 283 U. S. 865	18
Sorrentino v. *United States*, 163 F. 2d 627	12, 20, 21, 22
State ex rel. Treseder v. *Remann*, 165 Wash. 92, 4 P. 2d 866	37
Stein v. *United States*, 166 F. 2d 851, certiorari denied, 334 U. S. 844	34
Stoppelli v. *United States*, 183 F. 2d 391	34
Trial of Thomas Hardy, 24 State Trials 199	19
United States v. *A. B. Dick Company*, 7 F. R. D. 437	31
United States v. *Andolschek*, 142 F. 2d 503	40
United States v. *Bookie, et al.*, 229 F. 2d 130	39, 41
United States v. *Chichester Chemical Company*, 298 Fed. 829	39
United States v. *Chiarelli*, 192 F. 2d 528, certiorari denied, 342 U. S. 913	33, 34, 37
United States v. *Conforti*, 200 F. 2d 365, certiorari denied, 345 U. S. 925	12, 20, 21, 23, 25, 27
United States v. *Coplon*, 185 F. 2d 629	40
United States v. *Krulewitch*, 145 F. 2d 76	40
United States v. *Debrow*, 346 U. S. 374	31
United States v. *Glasser*, 116 F. 2d 690, modified, 315 U. S. 60	31
United States v. *Li Fat Tong*, 152 F. 2d 650	18
United States v. *Moses*, 220 F. 2d 166	21
United States v. *Rosenberg*, 10 F. R. D. 521	31
United States v. *Sawyer*, 210 F. 2d 169	21
United States v. *Wilson*, 72 F. Supp. 812	31
Vogel v. *Gruaz*, 110 U. S. 311	18, 19
Wallace v. *Hunter*, 179 F. 2d 59	32
Wilson v. *United States*, 59 F. 2d 390	18, 20
Wilson v. *United States*, 65 F. 2d 621	20
Worthington v. *Scribner*, 109 Mass. 487	19
Yee Hem v. *United States*, 268 U. S. 178	15, 33

Statutes and Rules: Page

Harrison Anti-Narcotic Act, act of December 17, 1914, c. 1, 38 Stat. 785, as amended February 24, 1919, c. 18, sec. 1006, 40 Stat. 1057, 1130, 1131 ... 35
21 U. S. C. 174 ... 3, 4, 15, 17, 25, 33
26 U. S. C. (1952 ed.) 2554 (a) ... 2, 3
26 U. S. C. 4705 (a) ... 3
Rule 7f, Federal Rules of Criminal Procedure ... 31

Miscellaneous:

56 A. L. R. 1273, 1274 ... 36
153 A. L. R. 1218, 1251 ... 37
8 Wigmore, *Evidence*, 3rd ed. 1940, pp. 751–757 ... 19
1 Whartons' *Criminal Evidence* (Anderson, 12th ed. 1955), p. 217 ... 36

In the Supreme Court of the United States

OCTOBER TERM; 1956

No. 58

ALBERT ROVIARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 141–145) is reported at 229 F. 2d 812.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1956 (R. 145). A petition for a rehearing was denied on March 7, 1956 (R. 146). The petition for a writ of certiorari was filed on April 6, 1956 and was granted on May 21, 1956 (R. 146). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for a violation of 21 U. S. C. 174, based upon possession of heroin which was proved by the testimony of two officers who observed petitioner handle a package of the drug, was invalid because the government was allowed to withhold the identity of an informant who was also present at the transaction but who was not called to testify.

2. Whether proof of the fact that petitioner possessed narcotics, unexplained by him, was sufficient to authorize his conviction under 21 U. S. C. 174.

3. Whether the trial court properly refused to order production of a report made by a narcotics agent to his superiors when the basis for the request was that a notation on the envelope in which the heroin was kept, made by an officer not present at the time, was to the effect that officer Bryson had found the narcotics, whereas the testimony of the officers at the trial was that agent Durham had first retrieved the narcotics and turned it over to Bryson.

STATUTES INVOLVED

26 U. S. C. (1952 ed.) 2554 (a) provided:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

21 U. S. C. 174 provides in relevant part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

In a trial without jury before the United States District Court for the Northern District of Illinois, Eastern Division, petitioner was found guilty upon two counts of an indictment, returned September 3, 1954, charging that (1) on August 12, 1954, at Chicago, Illinois, he unlawfully sold heroin to one "John Doe" in violation of 26 U. S. C. 2554 (a) (*supra*, p. 2),[1] and (2) on the same date and in the same place, he knowingly received, concealed and facilitated the transportation, after importation, of

[1] Now 26 U. S. C. 4705 (a).

heroin in violation of 21 U. S. C. 174 (*supra*, p. 3) (R. 2, 132). Petitioner was sentenced to two years imprisonment and a fine of $5.00 on each count, the sentences to run concurrently (R. 132–133).

1. Before trial, petitioner filed a motion for a bill of particulars (R. 3–4) requesting the name, address and occupation of John Doe, the date and time of day, and the place of occurrence by street and number, of the alleged offense.[2] The court denied the motion (R. 4).

At the trial, the government relied upon the testimony of two federal narcotics agents, Durham and Fields, and two Chicago narcotics detectives, Bryson and Sims, all of whom knew petitioner by sight, having observed his movements prior to August 12, 1954, the date of the alleged commission of the crime (R. 7, 53, 83, 102, 105, 117). On this date, at 9:30 p. m., these four officers met together with an informant who had worked with the police for many years (R. 95) but is described only as "John Doe", at 75th and Prairie Avenue in Chicago (R. 13, 85, 107, 117). There the officers searched the person of Doe and the interior and trunk of his Cadillac sedan (R. 13, 14, 86, 107–108, 118). Detective Bryson then secreted himself in the trunk of the Cadillac with the aid of a device which permitted the lid of the trunk to be raised and lowered from the inside at will (R. 14, 86–87, 108, 118). Doe took the wheel of the Cadillac; Sims and Fields entered one government automobile and Durham another; the three cars proceeded to 70th Street and St.

[2] The indictment charged (R. 2) that the offenses occurred on "to wit, August 12, 1954, at Chicago, Illinois".

Lawrence Avenue where they parked at varying distances (R. 14–15, 108, 118).

Approximately an hour later at 11:05 p. m., Durham, Fields and Sims saw petitioner arrive on the scene driving a Pontiac sedan with an unidentified man as a passenger. They saw petitioner alight from the Pontiac and enter the Cadillac to sit beside Doe on the front seat while the unidentified man who had arrived with petitioner slid under the wheel of the Pontiac and drove away (R. 16, 108, 118–119). The Cadillac then proceeded by a circuitous route to 74th Street between Champlain and St. Lawrence Avenue stopping once en route to turn off its lights and park (R. 17). Both government cars fell in behind the Cadillac but only the one driven by Durham, with its light extinguished at intervals, followed the Cadillac into 74th Street. (R. 17, 82, 109, 119). There Durham, stepping out of his car onto the sidewalk, saw petitioner alight from the Cadillac less than 100 feet away (R. 64, 67, 69). It was a clear night, the moon was almost full (R. 78), and a street lamp illuminated the area around the Cadillac (R. 17–18). Durham saw petitioner walk a few feet to a nearby tree, pick up a small package, return to the open right front door of the Cadillac, deposit the package therein, and then wave to John Doe and walk away (R. 18, 66–69). Durham went immediately to the Cadillac and recovered the package from the floor (R. 18, 70). He knocked on the side of the Cadillac as a signal to Bryson and then walked to the street intersection in time to see petitioner enter the Pontiac, parked nearby, and ride away (R. 18, 19, 70–71).

Meanwhile, Bryson, in his place of concealment in the trunk of the Cadillac, had, during the wait before petitioner entered the car at 70th Street and St. Lawrence Avenue, carried on a conversation with John Doe in the front seat (R. 86). He was able to hear a conversation between John Doe and the man entering the car at 11:05 p. m. (whom he later identified as petitioner). Bryson heard petitioner greet John Doe, direct him as to route, and admonish him once to pull over to the curb, cut the motor, and turn out the lights so as to lose a "tail" (R. 90). He heard petitioner ask Doe about money owed and advise Doe that he had brought him "three pieces this time" (R. 90, 91). When Bryson heard Doe being ordered to stop the car a second time, he raised the lid of the trunk (R. 91, 96). He saw petitioner walk to a tree, pick up the package, and return toward the car (R. 91, 97–99). He heard petitioner say, "Here it is", and "I'll call you in a couple of days" (R. 91, 99). Shortly thereafter he heard Durham's signal to come out. He emerged from the trunk to find Durham with the package (R. 91).

Sims and Fields, who in driving had deviated from the route taken by the Cadillac (*supra*, p. 5), arrived at 74th Street and St. Lawrence at this point (R. 18–19, 91, 109, 119). In approaching, they observed the Pontiac sedan which they had seen earlier parked in this vicinity (R. 109, 119). As they arrived, they saw petitioner walking toward the Pontiac (R. 109, 120). They did not follow petitioner but

joined the other officers at which time they saw Durham with a package in his possession (R. 109, 120).

The officers, accompanied by Doe, drove to 69th Street and Cottage Grove. They opened the package to find enclosed three glassine envelopes containing a white powder. They conducted a field test on the powder; a positive reaction indicated an opium derivative (R. 20, 91–92, 109, 120). Durham turned the package over to Bryson (R. 28).

Thereafter, at about 12:25 a. m. (R. 36, 92), the officers, still accompanied by Doe, arrested petitioner at his residence, taking him in one car, and Doe in another, to Chicago police headquarters (R. 25, 92, 111, 121). En route with officers Bryson and Durham, petitioner refused to name his "connection", saying that he didn't want to get anybody else in trouble, and that "You got me" (R. 93), "I stood up twice before, and I'll take it this time" (R. 27).

The morning after the arrest, petitioner was turned over to the Federal Commissioner of the Bureau of Narcotics (R. 114). John Doe was kept in custody overnight also at Chicago police headquarters. The arresting officers had no knowledge of any charge having been filed against him (R. 115).

Throughout the cross-examination of these government witnesses, repeated objections to persistent questions by petitioner's counsel as to the identity of John Doe were sustained (R. 40–42, 103–104, 113–114, 125–126). Government counsel based his objections on the ground that, prior to the trial, the court had ruled that the government need not reveal the identity of the

informant, and that to do so would make his services valueless to the government in other cases (R. 40, 104).

Further, in cross-examination, counsel for petitioner questioned Durham about part of an alleged conversation that took place at police headquarters when petitioner was confronted with Doe (R. 52). The court reserved its decision as to whether such evidence was properly admissible (R. 55), later striking it from the record (R. 55, 56).[3]

In spite of the court's ruling as to the inadmissibility of this testimony, counsel for petitioner later cross-examined Bryson about the alleged conversation without objection, as follows (R. 95):

> Q. Well, did he [John Doe] say anything with reference to any acquaintanceship or any prior association with this man or any transaction with this man?

---

[3] The evidence which, if allowed to stand, would have been that Durham heard John Doe say that he did not know petitioner was elicited by petitioner's counsel as follows (R. 52):

"Q. As a matter of fact, Doe said he did not have a transaction with him, didn't he, in Roviaro's presence?

"A. Do you want the entire conversation?

"Q. Isn't what I asked you a fact?

"A. No, sir. He didn't deny it.

"Q. Didn't Doe say he didn't even know him?

"A. Yes, sir, at first he did.

"Q. And this was the man who was an informer, set up by you for this transaction?

"A. That's right."

On re-direct examination, government counsel established that Durham had seen petitioner in the company of Doe on two previous occasions—arguing successfully, over objection, that petitioner's counsel had, through his cross-examination, put the fact of Doe's acquaintance with petitioner in issue (R. 52, 53).

A. Yes. In the presence of the Defendant, to make the Defendant——

Q. Forget your purpose, now. What did he say?

A. Well, he said he didn't know the Defendant here. He said he had never seen him before.

Q. That was the John Doe that was sitting in the front seat of the Cadillac?

A. Yes, sir.

Upon redirect examination, government counsel established that Bryson had seen petitioner meet Doe on a previous occasion and the court, over objection, allowed the testimony to stand (R. 102).

2. The package which had been found in the car was turned over by Durham to Bryson (R. 28, 49) and then given to Fields in the police interrogation room (R. 28). When analyzed, it was found to contain heroin (R. 31–32).

An envelope into which the heroin had been sealed after being weighed at the Federal Narcotics Bureau on August 13th (R. 30, 122) was introduced into evidence as Exhibit 6 (R. 131). Entries made in ink upon the face of the envelope include the name and address of petitioner and a description of the contents. Opposite the printed words "How obtained" the printed words "Purchased by" are crossed out in ink, and after the printed words "Found by" there appears a notation in the handwriting of agent Fields, "Officer James L. Bryson." After the printed words "Where obtained" it is noted "74th & St. Lawrence Ave., Chicago, Illinois." The date is noted

as August 12, 1954, and the time as 11:15 p. m. Opposite the printed words "Amount Paid," there is an entry "None." The names of four officers appear as witnesses, and the agent reporting the case is shown as Durham. The reverse side of the envelope, bearing the initials of Fields and Durham, indicates that the heroin was weighed and sealed by Fields, while witnessed by Durham, on August 13, 1954.

On cross-examination, Durham conceded that the notation on the envelope (Exhibit 6) as to how the heroin was obtained was inconsistent with his testimony, but explained that it was an error on the part of Fields (R. 48–49). Fields stated that the information which he noted on the envelope was given to him by Durham on August 13th (R. 123). Fields further said that he did not consider Exhibit 6 as an "official" government report. He said there were other reports of the transaction but that he did not know whether they were consistent with the information given him by Durham as noted on the envelope (R. 123, 126). At this point, petitioner's counsel requested that the "official" report be produced. The court sustained an objection to the request (R. 126–128).

At the conclusion of the government's case, petitioner called no witnesses but moved for a judgment of acquittal which was denied (R. 130).

Upon appeal, petitioner asserted that the trial court committed error in denying the motion for a bill of particulars and in limiting cross-examination as to the identity of John Doe, and in denying his request

for the production of the report of agent Durham (R. 141). The Court of Appeals affirmed the conviction (R. 145), holding that it was not necessary to decide whether John Doe was an active participant in the offense of sale charged in count 1 so as to entitle petitioner to full disclosure of Doe's identity, inasmuch as guilt under count 2 was sufficient to support the sentence (R. 141–143). The court further found no error or abuse of discretion on the part of the trial court in denying the motion for production of the report, ruling that there was no sufficient showing of its materiality (R. 143–145).

SUMMARY OF ARGUMENT

Petitioner's conviction on count 2 was based upon his possession of the narcotics; it was proved by two eyewitnesses, positive in their identification, who saw him pick up a package and carry it to a car; the testimony of the other witnesses supported this direct testimony that petitioner was the individual who had possession of the package of narcotics. No serious attempt was made at the trial to challenge the identification of petitioner as the person who carried the package. Under these circumstances, although the unnamed informant was sitting in the car to which the package was brought by petitioner, the informant was merely an additional government witness, whose identity was not shown to be material or necessary to the defense. The Court of Appeals therefore properly held that non-disclosure of the informant's identity did not constitute reversible error.

I

It is settled that the government is privileged to withhold the identity of an informant unless disclosure is essential to the defense of an accused. When disclosure becomes essential is a question which, of necessity, depends upon the circumstances of the particular case. The problem is one of balancing the public's interest in detection and suppression of crime against the individual's interest in preparing his defense. Petitioner argues, however, that three relatively recent cases—*Sorrentino* v. *United States*, 163 F. 2d 627 (C. A. 9), *United States* v. *Conforti*, 200 F. 2d 365 (C. A. 7), certiorari denied, 345 U. S. 925, and *Portomene* v. *United States*, 221 F. 2d 582 (C. A. 5)—stand for the proposition that where an informant is present at the time of the illegal act, as here, disclosure is required *per se*. But no such fixed and axiomatic rule can be drawn from these cases, whose holdings turn on their varying circumstances; in each, the court tested whether disclosure was actually required in fairness to the defendant and decided the case on that basis.

The interests of justice did not require disclosure here. As stated above, petitioner's guilt on count 2 was based on the testimony of the eyewitnesses who saw him possess and transport the heroin. The informant, "John Doe", was not a "participant" in such possession and transportation. Assuming, *arguedo*, that his observations as a third eyewitness might have been of some probative value to petitioner (an unlikely assumption in view of the circumstances),

the only issue upon which they could have conceivably been material was that of mistaken identity. But petitioner neither raised nor even suggested such an issue at the trial. In fact, in the face of clear and convincing proof of guilt, he made no attempt at rebuttal. He did not take the stand to deny his guilt, and thus put his identiy in issue, and he called no witnesses. He made no showing that Doe's testimony would be helpful to him—certainly no showing that it was essential.

Such a showing would have been necessary even had Doe not been an informant whose communications were privileged, for the prosecution is not required to call all eyewitnesses to testify, or to disclose their names, when there has been no showing by the defense that evidence to be supplied by them will be more than merely cumulative or corroborative. And, in the absence of a contrary showing, it must be assumed that Doe's testimony in this regard would have been no more than cumulative, for petitioner's identification was established by four officers who placed him at the scene of crime, three of whom saw him meet Doe, and two of whom saw him handle the narcotics.[4] In the analogous situation of production of official reports made by a government witness, this Court has

[4] Though it was not stressed at the trial, petitioner now emphasizes testimony by the officers at the trial, on cross-examination, that the informant had said, at the police station in petitioner's presence, that he did not know petitioner. *Supra*, pp. 8–9. But it seems apparent from this remark, in its full context, that the informant was merely trying to maintain the pretense that he, too, had been arrested and was not an informant.

held that a proper foundation must be laid, such as by a showing that the documents contain contradictory information which is directly relevant, important, and material to the issue. *Gordon* v. *United States*, 344 U. S. 414. Petitioner laid no foundation at all for his demand in the present case.

Petitioner's assertions of deprivation of constitutional rights merely restate his evidentiary claim and do not aid his cause. Disclosure was either material to his defense, or it was not, and, if not, he was not deprived of established rights by non-disclosure. The mandate of the Sixth Amendment, which guarantees to an accused the right to cross examine witnesses who meet him face to face at trial and testify in his presence, was here literally complied with. Petitioner's charge that he was deprived of information as to the nature and cause of the accusation against him because he was denied a bill of particulars is likewise without merit. He did not challenge the sufficiency of the indictment, and the bill of particulars, having merely the function of providing specificity to the charge, would not be granted to require the disclosure of a privileged communication or the identity of a witness whose presence at the trial was not contemplated, required, or essential.

II

Petitioner also contends that the prosecution did not affirmatively show that he *knowingly* possessed narcotics and that his conviction must fail for this reason. In this he ignores the plain meaning of the

provision of 21 U. S. C. 174 (*supra*, p. 3) which makes *possession sufficient evidence to authorize conviction* unless an accused explains such possession satisfactorily—a presumption which was held valid by this Court in *Yee Hem* v. *United States*, 268 U. S. 178. Although the prosecution has the burden of proving the essential elements of a crime, it is consistent with the constitutional protection of an accused to throw upon him the burden of proving facts peculiarly within his knowledge. *Casey* v. *United States*, 276 U. S. 413, 418. In such a case it is not the burden of proof which shifts but the burden of going forward with the evidence. Petitioner here was shown to possess a package containing narcotics. If he did not know the contraband nature of the package, the statute required him to prove this fact. This he declined to do.

Moreover, the evidence was clearly sufficient to show knowing possession. Witnesses told of petitioner's surreptitious conduct on the night of the crime, his clandestine meeting with the informant and the circuitous route taken to the bizarre location where the narcotics were handled. Knowledge of the illegal character of the contents of the package is a reasonable inference to be drawn from these facts.

III

Petitioner's claim that the trial court erred in refusing his request for the production of federal agent Durham's alleged written report to the Narcotics Bureau is likewise without merit for the reason that

no proper foundation was, or could have been, laid for the demand in question. See *Gordon* v. *United States*, 344 U. S. 414. The demand was made at the trial after counsel for petitioner had noted that an envelope in which the heroin had been preserved bore a notation made by federal agent Fields (who was not present at the time the package was found) that Chicago detective Bryson found the narcotics, whereas the trial testimony was that Durham first found the package at the site of the crime (with Bryson there), and then turned it over to Bryson who gave it to Fields who placed it in (and labelled) the envelope. The alleged discrepancy—going merely to the question of which officer (Durham or Bryson, both of whom were present) first laid hands on the contraband immediately after the commission of the crime—was not a material contradiction upon which a demand for production of government documents could properly be based, for it was not at all relevant to the issue of petitioner's guilt or innocence of the crime charged. The variance between the label and the testimony was as to an immaterial and insignificant fact.

Moreover, all the trial testimony is consistent that it was Durham who first recovered the narcotics. It was not established or even shown prima facie that there was a contradiction between this testimony and Durham's prior written report which was demanded. The label on the envelope was not evidence; it did not even have the status of a "report." It was added by Fields the day after the crime merely for purposes of identifying the narcotics—with respect to which there was

no issue. It is obvious that petitioner desired the report to search for possible contradictions. The court was not required to permit such a blind "fishing expedition." *Gordon* v. *United States, supra.* It properly denied the demand for production. See *Goldman* v. *United States,* 316 U. S. 129, 132.

ARGUMENT

I

SINCE THE IDENTITY OF AN INFORMANT SHOULD NOT BE DISCLOSED UNLESS IT IS MATERIAL TO THE DEFENSE OF THE ACCUSED, FAILURE TO DISCLOSE THE IDENTITY WAS NOT ERROR, IN THE CIRCUMSTANCES OF THIS CASE, IN RELATION TO THE CHARGE OF ILLEGAL POSSESSION OF NARCOTICS

The Court of Appeals has affirmed petitioner's conviction and sentence on count 2 of the indictment, charging illegal concealment and transportation of narcotics after importation in violation of 21 U. S. C. 174, *supra,* p. 3. That conviction is based upon the statutory presumption arising from possession which petitioner made no effort to rebut. It is in relation to that possession, which was clearly proved by eye witnesses whose testimony was not in any way contradicted or seriously contested by petitioner at the trial, that the Court of Appeals held the identity of the informant immaterial, with the result that nondisclosure did not require reversal of the conviction. That is also the position of the government in this case. Since the sentences on both counts were to run concurrently, count 2 alone will support the verdict.

Hirabayashi v. *United States,* 320 U. S. 81, 85; *Pinkerton* v. *United States,* 328 U. S. 640.

As we show below, the applicable decisions establish that there can be no fixed, automatic rule with respect to disclosure of the identity of informants. The problem is one of balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous in any case must depend on the particular circumstances of that case, taking into consideration the charge, the possible defenses, the significance of the informant's testimony, etc. It is in the light of all those factors that the Court of Appeals held that non-disclosure was not error as to the charge in count 2.

A. IT IS ESTABLISHED THAT THE GOVERNMENT IS PRIVILEGED TO WITHHOLD THE IDENTITY OF AN INFORMANT UNLESS SUCH IDENTITY IS ESSENTIAL TO THE DEFENSE OF THE ACCUSED

It is settled in our system of jurisprudence that communications made by an informant to the government are normally privileged against disclosure. *Scher* v. *United States,* 305 U. S. 251; *In re Quarles and Butler,* 158 U. S. 532, 535–536; *Vogel* v. *Gruaz,* 110 U. S. 311; *United States* v. *Li Fat Tong,* 152 F. 2d 650, 652 (C. A. 2); *McInes* v. *United States,* 62 F. 2d 180, 181 (C. A. 9), certiorari denied, 288 U. S. 616; *Wilson* v. *United States,* 59 F. 2d 390 (C. A. 3); *Shore* v. *United States,* 49 F. 2d 519, 522–523 (C. A. D. C.), certiorari denied, 283 U. S. 865; *Goetz* v. *United States,* 39 F. 2d 903 (C. A. 5); *Segurola* v. *United States,* 16 F. 2d 563, 565 (C. A. 1), affirmed on

other grounds, 275 U. S. 106. The privilege, which applies to the identity of the informant, had its early beginning in Anglo-American common law and is founded on public policy. *Parnell Commission's Proceedings*, 1888, 20th day, Times' Rep. pt. 6, p. 28; *Worthington* v. *Scribner*, 109 Mass. 487, 488; *Trial of Thomas Hardy*, 24 State Trials 199, 808; 8 Wigmore, *Evidence*, 3rd Edition 1940, pp. 751–757. It operates upon the principle that it is the right and the duty of every citizen to communicate to his government any knowledge which he may have of the commission of crimes, and that he should be encouraged to perform his duty without fear of consequences. *Vogel* v. *Gruaz*, 110 U. S. 311, 316; and *In re Quarles and Butler*, 158 U. S. 532, 535, citing *Worthington* v. *Scribner, supra*. The rule recognizes that crime detection is so important to the public that the channels by which crimes might be detected should not be unnecessarily disclosed. *Trial of Thomas Hardy*, 24 State Trials 199, 808, *supra*.

This privilege, however, is not without limitation. It was quickly perceived that there might be situations in which it would be necessary or right to compel disclosure. Early decisions left the determination to the trial judge and laid down the test that, as a matter of public policy (see *Marks* v. *Beyfus*, L. R. 25 Q. B. D. 494, 498), disclosure would be compelled when it was "material to the ends of justice," *Regina* v. *Richardson*, 3 F. & F. 693, or material to the issue. *Commonwealth* v. *Pomeroy*, 117 Mass. 143. More recent decisions likewise advance the test of materiality

as a means for determining when the government must accede to a defendant's demand for disclosure. See *Wilson* v. *United States*, 59 F. 2d 390, 393 (C. A. 3); *Wilson* v. *United States*, 65 F. 2d 621, 624 (C. A. 3) [5]; *Sorrentino* v. *United States*, 163 F. 2d 627 (C. A. 9); *United States* v. *Conforti*, 200 F. 2d 365 (C. A. 7), certiorari denied, 345 U. S. 925; *Portomene* v. *United States*, 221 F. 2d 582 (C. A. 5). This Court in *Scher* v. *United States*, 305 U. S. 251, at p. 254, stated the rule and the exception as follows:

> * * * public policy forbids disclosure of an informer's identity unless *essential* to the defense, as, for example, where this turns upon an officer's good faith. *Segurola* v. *United States*, 16 F. 2d 563, 565; *Shore* v. *United States*, 60 App. D. C. 137; 49 F. 2d 519, 522; *McInes* v. *United States*, 62 F. 2d 180. [Emphasis added.]

Petitioner relies principally on three cases, which, he asserts, hold that, where an informant is an "active participant" in the transaction which is the basis of the charge, that fact *per se* requires that his identity be disclosed. *Sorrentino* v. *United States*, 163 F. 2d 627 (C. A. 9); *United States* v. *Conforti*, 200 F. 2d 365 (C. A. 7), certiorari denied, 345 U. S. 925; and *Portomene* v. *United States*, 221 F. 2d 582 (C. A. 5). The actual holdings, however, do not support this flat generalization, which, as we show below, would in any

---

[5] In *Wilson* v. *United States*, 65 F. 2d at 624, the court said: "* * * the general rule of the courts is not to require a disclosure and it is only done when necessary to the protection of the innocent or to the judgment to be reached by the court. The rule not to compel a disclosure is a rule of policy which is followed unless it conflicts with a rule of justice."

event not be applicable here. The decisions represent merely particular applications of the general principle that the question of disclosure must be determined in the interests of justice in the light of all the circumstances. Indeed, in two of the cases (*Sorrentino* and *Conforti,* supra), there was no reversal despite the failure to disclose, because in those instances the courts found that the nondisclosure was not prejudicial.

In *Portomene,* 221 F. 2d 582, where a conviction was reversed, the indictment charged two *sales* of narcotics. The proof was that the unnamed informant, who had been searched, was observed meeting the defendant, and subsequently, after he had been followed by the agents, he handed the agents narcotics. As to one of the two sales, the agents did not even observe a transfer from the defendant to the informant (see 221 F. 2d at p. 583, fn. 1). The defendant, on the stand, denied that he had ever sold narcotics and offered testimony that a person, whom he believed to be the informant, had a grudge against him (see 221 F. 2d at p. 583). Clearly, in that situation, the name of the informant was essential to the defense. In the first place, a transfer is not necessarily a sale; there could be issues as to whether the defendant was the actual seller.* Second, there was,

* There are decisions, one arising in the Fifth Circuit which decided *Portomene*, to the effect that one who acts as an agent for the buyer is not a seller. *Adams* v. *United States*, 220 F. 2d 297 (C. A. 5); *United States* v. *Sawyer*, 210 F. 2d 169 (C. A. 3); (see also *United States* v. *Moses*, 220 F. 2d 166 (C. A. 3)). Without accepting the validity of these rulings, they do point up the difference between a charge of sale and a charge proved by possession alone.

especially in view of the defendant's denials, an issue as to whether a transfer did take place on both occasions. And, third, the name of the informant became directly relevant, in view of the proof offered on the motive of a possible informant to falsify.

Sorrentino v. *United States*, 163 F. 2d 627, *supra*, involved charges both of sale of narcotics in violation of the Internal Revenue Code and unlawful transportation and concealment in violation of 21 U. S. C. 174, but there was no direct evidence of any possession by the defendant. The agents heard the defendant and the unidentified informant make arrangements for the sale; they saw the informant, whom they had searched, enter a house with the defendant; and then they received narcotics from the informant. See 163 F. 2d at 628. It was in relation to this set of facts, in which no one saw either the sale or the possession by the defendant, that the court said (163 F. 2d at 629) that information as to the identity of the person to whom the defendant was alleged to have sold and dispensed the narcotics "was * * * material to appellant's defense, and appellant was entitled to a disclosure thereof." But even in that situation, the court did not reverse the conviction because it found, from the other evidence in the case, that the defendant did in fact know the name of the informant. The decision, therefore, cannot be used as support for the flat statement that the mere fact that the informant was present at the time of the act charged, *ipso facto*, requires disclosure of his identity, regardless of the totality of the circumstances.

United States v. *Conforti*, 200 F. 2d 365, decided by the same circuit which decided the instant case, is very similar to *Sorrentino*. There, the charge was possession of counterfeit notes with knowledge that they were counterfeit and with *intent to pass them*. Agents overheard the unnamed informant make arrangements with the defendant, saw the informant (whom they had searched) meet the defendant, usually (but not always) saw a package passed, and then received from the informant a package containing counterfeit. The defendant denied the telephone conversations and meetings attributed to him and denied that he had ever possessed counterfeit money (200 F. 2d at 366–367). The court pointed out that the evidence which proved possession was the same evidence which would show a sale, and expressed the view that, if the defendant had demanded disclosure of the identity of the informant, it would have been error to deny the request (200 F. 2d at 367). In this connection, the court could also have pointed out that possession alone was not the crime; that, in addition, there had to be an intent to pass, as to which the sale was the only evidence; and that the defendant, by his denials, had effectively raised an issue as to his participation in the crime. The court's actual holding was that, since the defendant had not sought the name of the informant, he could not predicate error on the non-disclosure. It noted that the "Government was under no duty to volunteer the names of all possible witnesses, nor was it required to bring into court as witnesses all persons who participated in or had

some knowledge of the transactions here involved." 200 F. 2d at 369. Again, the decision cannot be said to hold that the mere presence of the informant at the time of the transactions in and of itself requires disclosure of his identity.

As we read the rulings on this issue, they permit no specific formulas, no fixed yardstick for determining when disclosure must be required, and, even less, any simple rule by which non-disclosure can automatically be declared error. The problem is one to be resolved on the basis of the particular record in each case. It is basically one of balancing the public interest in suppression of crime against the conflicting interest of the individual defendant and of the public in the full presentation of the defense. From the standpoint of the public interest, the importance of encouraging proffered information by withholding the identity of an informant in cases involving illegal trafficking in narcotics is readily apparent. No crime poses a more serious social problem or leads more directly to the commission of other crimes. It is further a most difficult crime to detect. Because narcotics are small in volume, they lend themselves readily to concealment; a fortune in drugs can be carried under clothing and removed or destroyed on a moment's notice. Without the help of privileged communications, enforcement in this area would be well nigh impossible. On the other hand, if the disclosure of the identity of the informant is essential to an accused's defense—if the exercise of the government's privilege operates to deprive him of a fair

trial or a right guaranteed to him under the Constitution to know and defend against the charge and his accusers—then the general public interest in crime-suppression must yield to the defendant's private interest which is linked with the public interest in fair and adequate trials. That balance is to be struck on a case-to-case basis.

B. THE IDENTITY OF THE INFORMANT WAS NOT MATERIAL TO PETITIONER'S DEFENSE ON THE COUNT CHARGING ILLEGAL POSSESSION

Applying these principles to this record, the Court of Appeals, we think properly, held that the interests of justice did not require the disclosure of the identity of the informant as to count 2 charging a violation of 21 U. S. C. 174 (illegal possession), and proved by evidence of petitioner's possession of the narcotics.

It should be noted at the outset that, as is more fully discussed *infra*, pp. 33–37, in this charge the proved possession alone proves the whole crime. Unlike the situation in *United States* v. *Conforti*, 200 F. 2d 365 (C. A. 7), certiorari denied, 345 U. S. 925 (see *supra*, pp. 23–24), there was no necessity to show that the possession was with intent to make a sale, so that the sale could not be separated from the possession. Unlike *Portomene* v. *United States*, 221 F. 2d 582 (C. A. 5), where only sales were charged, petitioner's status as seller or agent could have had no materiality (see *supra*, pp. 21–22). The mere fact of possession is, under 21 U. S. C. 174, sufficient to prove the government's whole case.

Such possession by petitioner was proved by two eye-witnesses, United States Agent Durham, and Chi-

cago Police Officer Bryson, who *saw* petitioner with the heroin. Durham, standing but a short distance from the Cadillac in which petitioner and John Doe had been riding, saw petitioner alight, go to a nearby tree, pick up the package and carry it back to the car. Bryson, watching from his place of concealment in the trunk of the Cadillac, likewise saw petitioner pick up the package and come back to the car. These observations were made on a clear moonlit night in a well lighted area. Both of the law enforcement officers had observed petitioner on other occasions previously. They were positive of their identification of him and there was no question that the package which they saw him handle contained heroin. *Supra,* pp. 4–6, 8–9.

This clear, unequivocal testimony showing actual possession by petitioner himself (and indeed actual transportation from the tree to the car), established the crime charged, and cast on petitioner the burden (which he declined to meet) of going forward with testimony to explain his possession. To call the informant "John Doe" a "participant" as to this offense is to do violence to the plain meaning of that word. As to the charged "possession" of the heroin, Doe was no more than a third eyewitness, whose testimony or disclosure would not be required in the absence of a showing that evidence which he could supply would be helpful to petitioner. *Jordon* v. *Bondy,* 114 F. 2d 599, 603–604 (C. A. D. C.); *Morton* v. *United States,* 147 F. 2d 28, 31 (C. A. D. C.), certiorari denied, 324 U. S. 875.

Doe's presence at the time of the charged possession could neither aid nor detract from the proof of the crime except on an issue of mistaken identity. If there had been, in this case, any real suggestion of the possibility of a mistake in identity, we would agree that the non-disclosure of Doe's identity constituted error. But there was no such issue. Unlike the situation in both *Portomene* and *Conforti* (*supra*, pp. 21–22, 23–24), petitioner neither took the stand himself to deny the transaction, and thus put his identity in issue, nor did he call any witnesses in an endeavor to show a mistake in identity. Even more, nothing in the cross-examination of any of the officers on the government's case raised any real issue in this regard. Indeed, all the corroborating testimony points directly to petitioner as the man who carried the narcotics from the tree to the car. *Supra*, pp. 5, 6–7.

Belatedly, petitioner attempts to raise an issue of identity by emphasizing testimony (most of which was stricken from the record) of an alleged statement made by John Doe, when confronted with petitioner in the police interrogation room, to the effect that he did not know petitioner and had never seen him before. This testimony was elicited on cross-examination of government witnesses Durham and Bryson in a manner which emphasizes the unreality of the present claim as to a possible mistake in identity. Of course, the testimony regarding the informant's statement, being hearsay, was not proof of the truth of the matter asserted in the statement; both witnesses immediately

thereafter rebutted any inference to be drawn from the admission by pointing out that they had personally seen petitioner with Doe on previous occasions. Bryson tried to say *why* Doe made the denial when confronted with petitioner after the arrest but he was prevented from explaining this by petitioner's counsel. *Supra,* pp. 8–9.[1] It seems plain that the denial was a part of the general pretense aimed at convincing petitioner that Doe had played no part in his arrest in order to protect the informant and his continued use to the government. This is further borne out by the evidence that Doe was taken in a separate car to police headquarters (as if he, too, were being arrested), and was then kept in custody overnight in further attempt to make it appear that he had been genuinely arrested. *Supra,* p. 7. It is clear that Doe's testimony, if given in court, would not have aided in overcoming petitioner's identification, established as it was by the testimony of four officers who placed him at the scene of the crime, three of whom also saw him meet Doe on that evening, and two saw him possess and transport the narcotics. Rather, Doe's testimony would have been merely cumulative or corroborative of the facts fully proved by the officers' testimony. Nothing would have been added except the unnecessary and harmful disclosure of the informant's identity.

Furthermore, there was no showing by petitioner that he required disclosure of Doe's identity to prove that he was not the man whom the officers saw and

---

[1] See also Durham's testimony as to the informant's statement. *Supra,* p. 8, fn. 3.

identified as committing the crime. In the analogous situation of production of official reports or memoranda made by a government witness, this Court has held that a defendant cannot engage in a "fishing expedition" but must lay a proper foundation for such compulsory production by showing substantial reasons for believing that the documents will be pertinent. *Gordon* v. *United States*, 344 U. S. 414, 418–419; *Goldman* v. *United States*, 316 U. S. 129. See the Government's brief in *Jencks* v. *United States*, No. 23, this Term, at pp. 25 *ff*. Likewise, with respect to ordinary eyewitnesses, federal courts have held that the prosecution's failure to call all such persons to testify or to disclose their names to the defense is not error where there has been no *showing* that evidence to be supplied by them would be helpful to the defendant. *Jordon* v. *Bondy*, 114 F. 2d 599, 603–604 (C. A. D. C.); *Curtis* v. *Rives*, 123 F. 2d 936, 940 (C. A. D. C.); *Morton* v. *United States*, 147 F. 2d 28, 31 (C. A. D. C.), certiorari denied, 324 U. S. 875. Surely, no greater strictness should be observed under the circumstances of this case to require the naming of an eyewitness informant whose identity falls within the rule of privileged communications, in the absence of a showing that such knowledge has some real bearing on some possible defense.

C. THE EXERCISE OF THE GOVERNMENT'S PRIVILEGE OF NON-DISCLOSURE IN THE CIRCUMSTANCES OF THIS CASE DID NOT DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHT

Petitioner does not advance his argument that he was entitled, in the interests of justice, to the dis-

closure of the identity of the informant by endeavoring to make the same argument in other terms. Disclosure was either shown to be material to the defense, in which event it should have been made, or it was not. And if it was not, petitioner was deprived of no substantial rights by the non-disclosure.

The argument, for example, that petitioner was denied the right of cross-examination (Pet. Br. 22) adds nothing to his case. The guaranty of the Sixth Amendment is to "secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." *Cf. Dowdell* v. *United States,* 221 U. S. 325, 330; *Mattox* v. *United States,* 156 U. S. 237, 242. This mandate was literally complied with at petitioner's trial. What he really charges, therefore, is not that non-disclosure denied him the right of cross-examination, but that evidence was suppressed or a witness concealed whose testimony was essential to his defense. See *Curtis* v. *Rives,* 123 F. 2d 936, 938 (C. A. D. C.). In other words, he is merely rephrasing the issue, discussed above, whether the disclosure was material to the defense.

The same is true of the contention that non-disclosure of Doe's testimony deprived petitioner of his right to be informed of the nature and cause of the accusation against him. He does not deny the sufficiency of the indictment which clearly charged the offense with such reasonable certainty that he

could make his defense and protect himself against further prosecution. *United States* v. *Debrow,* 346 U. S. 374; *Hagner* v. *United States,* 285 U. S. 427. He bases his contention, instead, on the fact that he was denied a bill of particulars.[8] See Rule 7f, Federal Rules of Criminal Procedure.

A bill of particulars, however, has merely the function of providing specificity to the charge. *Norris* v. *United States,* 152 F. 2d 808 (C. A. 5), certiorari denied, 328 U. S. 850; *Maloof* v. *United States,* 159 F. 2d 62 (C. A. 9), certiorari denied, 331 U. S. 818; *Kaufman* v. *United States,* 163 F. 2d 404 (C. A. 6); *United States* v. *Glasser,* 116 F. 2d 690 (C. A. 7), modified on other grounds, 315 U. S. 60. Complete discovery of the prosecution's case is not contemplated. *Nye & Nissen* v. *United States,* 168 F. 2d 846 (C. A. 9), affirmed, 336 U. S. 613; *United States* v. *Rosenberg,* 10 F. R. D. 521 (S. D. N. Y.); *United States* v. *A. B. Dick Company,* 7 F. R. D. 437 (N. D. Ohio); *United States* v. *Glasser, supra.* Neither is the disclosure of the names of witnesses who will appear at the trial. *Gates* v. *United States,* 122 F. 2d 571 (C. A. 10), certiorari denied, 314 U. S. 698; *United States* v. *Wilson,* 72 F. Supp. 812 (W. D. Mo.). Much less could a bill of particulars be said to require the disclosure of a privileged communication or the identity of a witness who will not, and need not if his testimony is not material, appear at the trial.

---

[8] In addition to matters relative to the identity of John Doe, the motion for a bill of particulars requested the date, time and place, by street and number, of the alleged offense.

Likewise, petitioner's contention that he was denied the right of compulsory process to obtain witnesses in his favor is without foundation. It begs the question at issue to say that Doe was a witness in petitioner's favor. Petitioner's efforts were not directed at causing Doe to be subpoenaed as his witness; he rather demanded Doe's disclosure as a government witness. The right to compulsory process under the Sixth Amendment does not contemplate the subpoenaing of a government witness at government expense. *Wallace* v. *Hunter*, 149 F. 2d 59, 61 (C. A. 10).

On the question of disclosure, there is only one issue in this case, no matter how it is phrased—whether there was any showing that made disclosure necessary in the interests of justice and therefore required a departure from the usual rule that the identity of an informant is privileged. We believe that there was so little showing of any possibility that the informant could have aided in the defense of count 2—which was wholly proved by solid evidence of possession, as to which the nature of the transaction as a sale or otherwise was immaterial, and the possession proved was by petitioner himself without the participation of the informant who was merely an additional observer—that there was no glimmering of a showing of materiality to the defense. Under these circumstances, there is nothing in this record to warrant reversal of a conviction amply sustained by the evidence.

II

PETITIONER'S CONVICTION UNDER 21 U. S. C. 174 IS SUPPORTED BY HIS UNEXPLAINED POSSESSION OF HEROIN

Petitioner contends that proof of the fact of his unexplained possession of heroin does not authorize his conviction, notwithstanding the statutory presumption of guilt which is provided by 21 U. S. C. 174 (*supra*, p. 3):

> Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Petitioner does not challenge the validity of this presumption, a question which was set at rest in *Yee Hem* v. *United States*, 268 U. S. 178. He contends, rather, that the possession contemplated by the statute is *knowing* possession and that the presumption does not operate to convict one shown to possess narcotics in the absence of an additional affirmative showing that the accused knew that he possessed narcotics.

It is difficult to understand how petitioner believes that this argument, if accepted, would aid him. The evidence of petitioner's surreptitious conduct on the night in question, his clandestine meeting by automobile with the informant, the devious route taken to the place where petitioner picked up the package, the locating of the package under a tree, was more than enough to show guilty knowledge. See *United States*

v. *Chiarelli,* 192 F. 2d 528, 531 (C. A. 7), certiorari denied, 342 U. S. 913, where the court found that a defendant throwing a package into the street in trying to flee from the police had knowledge of its contraband narcotic content; *Aeby* v. *United States,* 206 F. 2d 296, 298–299 (C. A. 5), certiorari denied, 346 U. S. 885, in which the jury found that a defendant husband had knowing possession of heroin when that drug was found on paraphernalia in his home and on his wife's person. In the instant case, the court was the trier of facts and the sole judge of the credibility of witnesses. There was before it ample evidence to justify the affirmative inference that petitioner's possession was a knowing one.

In any event, the plain meaning of the statute is that the prosecution is required only to prove possession. While it is true that guilty knowledge is an essential element of the statutory crime (see *Stein* v. *United States,* 166 F. 2d 851, 854 (C. A. 9), certiorari denied, 334 U. S. 844), it does not follow that the prosecution has the burden of going forward with evidence of knowledge, after having proved possession. The statute says that unexplained *possession* is *sufficient evidence* to authorize conviction; nothing more is required. This statutory presumption places upon the accused the burden of going foward to explain and justify the possession. *Casey* v. *United States,* 276 U. S. 413, 418; *United States* v. *Chiarelli,* 192 F. 2d 528, 531 (C. A. 7), certiorari denied, 342 U. S. 913; *Stoppelli* v. *United States,* 183 F. 2d 391 (C. A. 9); *Landsborough* v. *United States,* 168 F. 2d 486 (C. A.

6), certiorari denied, 335 U. S. 826. Petitioner preferred not to assume this burden.

There is nothing novel about thus shifting to the accused the burden of going forward with the evidence. This Court, speaking through Mr. Justice Holmes in *Casey* v. *United States,* 276 U. S. 413, which upholds the constitutionality of a similar statutory presumption in the Harrison Anti-Narcotic Act,[9] said at page 418:

> With regard to the presumption of the purchase of a thing manifestly not produced by the possessor, there is a "rational connection between the fact proved and the ultimate fact presumed." *Luria* v. *United States,* 231 U. S. 9, 25; *Yee Hem* v. *United States,* 268 U. S. 178, 183. *Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. Greer* v. *United States,* 245 U. S. 559. *The statute here talks of prima facie evidence but it means only that the burden shall be upon the party found*

---

[9] Sec. 1 of the Act of December 17, 1914, c. 1, 38 Stat. 785, as amended February 24, 1919, c. 18, § 1006, 40 Stat. 1057, 1130, 1131, provided in relevant part:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; * * *."

The proof showed that Casey was in possession of drugs not in stamped packages. To sustain a charge of unlawful purchase, the government relied upon the above presumption not only to prove the *fact* of purchase but also the *place* of purchase (so as to support venue).

> *in possession to explain and justify it when accused of the crime that the statute creates.* 4 Wigmore, Evidence, § 2494. *It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government.* 4 Wigmore, Evidence, § 2486. In dealing with a poison not commonly used except upon a doctor's prescription easily proved, or for a debaunch only possible by a breach of law, it seems reasonable to call on a person possessing it in a form that warrants suspicion to show that he obtained it in a mode permitted by the law. The petitioner cannot complain of the statute except as it affects him. [Emphasis added.]

To the same effect, see 1 Wharton's *Criminal Evidence* (Anderson, 12th edition, 1955), p. 217, where it is said:

> If knowledge by the defendant is an essential element of a crime, the prosecution has the burden of proving that he possessed such knowledge, although *the prosecution is aided by the existence of presumptions that place upon the defendant the burden of proving those facts which are peculiarly within his own knowledge.* [Emphasis added.] [10]

---

[10] Examples cited include the crime of bigamy, with respect to which the prosecution is not required to prove that a prior marriage has been dissolved (see cases collected in 56 A. L. R. 1273, 1274), and the crime of assault with a gun with respect to which it has been held that the defendant has the burden of showing that the gun was not loaded (*Price* v. *United States*, 156 Fed. 960

In the instant case, if petitioner did not know that the package which he carried contained heroin, this was a fact peculiarly within his own knowledge which the law may and did constitutionally require him to prove. *United States* v. *Chiarelli*, 192 F. 2d 528, 531 (C. A. 7), certiorari denied, 342 U. S. 913.

III

THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR PRODUCTION OF AN ALLEGED WRITTEN REPORT OF THE CRIME MADE BY A FEDERAL AGENT TO HIS SUPERIORS

Petitioner contends that the trial court committed error in refusing his request for the production of federal agent Durham's alleged written report to the Narcotics Bureau. *Supra*, pp. 9–10. The request was made at the trial after counsel for petitioner had noted that an envelope (Exhibit 6 in evidence) in which the recovered narcotics had been preserved by the officers bore a notation, made by federal agent Fields (who was not present at the time the package was found), that Chicago detective Bryson found the narcotics, whereas the trial testimony was that Durham first found the package at the site of the crime (with Bryson there), and turned it over to Bryson, who gave it to Fields.

The sworn testimony of the four officers was not at variance with each other either as to this or any other detail. They searched the automobile before the

---

(C. A. 9)). There is likewise the burden placed upon a defendant to show that he is under age (see cases collected in 153 A. L. R. 1218, 1251) or not a fugitive from justice (*State ex rel. Treseder* v. *Remann*, 165 Wash. 92, 4 P. 2d 866). 1 Wharton's *Criminal Evidence*, *supra*, pp. 38–40.

crime was committed and Bryson secreted himself in the trunk. Durham, Fields and Sims (another Chicago detective) saw, and Bryson heard, petitioner enter the car during the night. At the site of the crime, Durham saw petitioner alight, walk a few feet away to a tree, pick up a package, return to the car and deposit the package in the car. Immediately thereafter, Durham, seeing petitioner walk away, went to the car and picked up the package which he found lying there. Bryson, in the meantime, having lifted the lid of the trunk slightly, likewise observed petitioner go to the tree, pick up the package, return to the car and then depart. He emerged from the trunk when Durham called to him, and saw Durham with the package. Both Fields and Sims arriving thereafter saw Durham with the package (R. 109, 120). A field test a few minutes later, conducted by the officers, proved that the package contained narcotics. It was at this point turned over to Bryson. Fields labeled it the next day, witnessed by Durham. *Supra,* pp. 4–7, 10.

It is apparent that the contradiction—between the label and the testimony—to which petitioner points as a basis for the production of the government files was not important or material to any issue in the case. The label on the envelope was not evidence. It was added by Fields, the day after the crime, merely for the purpose of identifying the narcotics, with respect to which there was no issue. The only question raised by the alleged discrepancy was whether Durham or Bryson (who were working together) first laid hands

on the package.[11] Such a minor discrepancy on so immaterial a matter furnishes no basis for production of government files. See *Gordon* v. *United States*, 344 U. S. 414, 418–419; *United States* v. *Bookie, et al.*, 229 F. 2d 130 (C. A. 7); see also *United States* v. *Chichester Chemical Company*, 298 Fed. 829 (C. A. D. C.); *Moffatt* v. *United States*, 232 Fed. 522 (C. A. 8).

The situation in *Gordon* v. *United States*, 344 U. S. 414, relied upon by petitioner, was quite different. The government's case stood or fell on the jury's belief or disbelief of one witness who himself was at that time awaiting sentence after a plea of guilty in another federal court for his part in the same crime. The witness admitted on cross examination that, prior to trial, he had given government agents statements conflicting with his trial testimony incriminating the defendant. This Court held that the denial of the defendant's motion for production of the conflicting statements was error and that this error, combined with another error in excluding evidence,[12] required reversal in that information necessary to a discriminating appraisal of the witness' trustworthiness was

---

[11] Testimony fixed the site of the crime to be 74th Street near Champlain Avenue. The envelope noted that the narcotics were found at 74th Street and St. Lawrence Avenue. There is no discrepancy here as the car in which the package was found was parked on 74th Street between St. Lawrence and Champlain Avenues.

[12] The additional evidence showed that the judge accepting the prior guilty plea of the witness advised him to cooperate with the probation authorities.

thus withheld from the jury to the prejudice of the defendant's substantial rights.[13]

In *Gordon*, the Court held that a proper foundation is laid for a demand for production by a *showing* that the documents (1) were in existence, (2) were in possession of the government, (3) were made by the government's witness under examination, (4) were contradictory of his present testimony, and (5) that the contradiction was as to relevant, important, and material matters which directly bore on the issue being tried: the participation of the accused in the crime. None of these factors, except the making of reports by the agents, was shown here.

Petitioner made no showing that anything in Agent Durham's alleged official report was in conflict with the testimony at trial. Fields testified that Durham wrote such reports but said that he did not know whether such reports contained information consistent with that which he (Fields) noted on the sealed envelope. As noted, the sworn testimony of the agents at the trial was entirely consistent. And as we have pointed out above, petitioner made no showing that the contradiction to which he points—the discrepancy between the notation on the label and the trial testimony as to who found the narcotics—was at all

[13] The other decisions relied upon by petitioner are all cases in which the evidence sought was essential to exculpate the defendant. See *United States* v. *Coplon*, 185 F. 2d 629, 638–639 (C. A. 2); *United States* v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2); *United States* v. *Andolschek*, 142 F. 2d 503, 506 (C. A. 2).

material. It is clear that petitioner desired to inspect the report to search for conceivable contradictions. This, petitioner admits in his brief when he argues, at p. 29:

> * * * Inspection of these reports, the existence of which was established by Agent Fields' testimony, would permit a determination of whether Agent Durham had made "additional" extra-judicial statements at variance with his sworn testimony. *If these contradicted* or varied from his testimony, the trial Court's and probably any Court's, confidence in his testimony might be affected to a point where his entire testimony must be disregarded. [Emphasis added.]

The court is not required to permit such a blind "fishing expedition." *Gordon* v. *United States, supra; United States* v. *Bookie,* 229 F. 2d 130, 133 (C. A. 7). See also *Bowman Dairy Co.* v. *United States,* 341 U. S. 214, 221, and the Government's brief in *Jencks* v. *United States,* No. 23, this Term, at pp. 24–44.

This Court said in *Goldman* v. *United States,* 316 U. S. 129, 132:

> We think it the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. * * * a large discretion must be allowed the trial judge.

Under the circumstances of this case, there was no abuse of discretion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

OCTOBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956